Petition

81-804

No.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

LOUISVILLE AND JEFFERSON COUNTY TRANSIT AUTHORITY, d/b/a TRANSIT AUTHORITY OF RIVER CITY - - Petitioner

versus

DIVISION 1447, AMALGAMATED TRANSIT UNION, AFL-CIO - - - - - Respondent

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND APPENDIX

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QUESTIONS PRESENTED

1. Should this Court resolve a conflict, between decisions of the Sixth and Eighth Circuits and a decision of the First Circuit, as to whether a private agreement, entered into pursuant to §13(c) of the Urban Mass Transportation Act, 49 U.S.C. § 1601 *et seq.*, preempts contrary state law?

2. Whether the U. S. Court of Appeals for the Sixth Circuit has improperly invalidated certain Kentucky statutes under the Supremacy Clause of the Constitution of the United States. U. S. CONST., art. VI.

3. Whether the U. S. Court of Appeals for the Sixth Circuit has sanctioned an intrusion of federal law into the protected area of state sovereignty in violation of the Tenth Amendment to the Constitution of the United States. U. S. CONST., amend. 10.

4. Whether federal courts have subject matter jurisdiction to hear cases involving violation of private agreements entered into pursuant to §13(c) of the Urban Mass Transportation Act, 49 U.S.C. §1601 *et seq.*

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No.

LOUISVILLE AND JEFFERSON COUNTY TRANSIT AUTHORITY, d/b/a TRANSIT AUTHORITY OF RIVER CITY - - - - - *Petitioner*

v.

DIVISION 1447, AMALGAMATED TRANSIT UNION, AFL-CIO - - - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Louisville and Jefferson County Transit Authority, respectfully prays that a Writ of Certiorari issue to review the Order of the court of appeals entered in this proceeding on July 28, 1981.

OPINION BELOW

The Order of the court of appeals is reported at ___ F. 2d ___ (6th Cir. 1981) and is set out in the Appendix hereto (App., pp. 21-23).

JURISDICTION

Respondent brought this suit pursuant to 28 U.S.C. §1331(a) and 49 U.S.C. §1601 *et seq.*, seeking to force petitioner to proceed to binding interest arbitration of disputed terms of an existing collective bargaining contract. The Order of the Court of Appeals was entered on July 28, 1981. This Petition was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause of the U. S. Constitution, U. S. Const., art VI, provides in pertinent part, as follows:

> This Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

The Tenth Amendment to the U. S. Constitution provides as follows:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Section 13(c) of the Urban Mass Transportation Act, 49 U.S.C. §1609(c)is set forth in the Appendix (App., p. 35).

Section 250 of the Kentucky Constitution, KRS 96A.070(6), KRS 96A.200, KRS 96A.360 and KRS

417.010 are set forth in the Appendix (App., pp. 56-61).

STATEMENT OF THE CASE

Petitioner, Louisville and Jefferson County Transit Authority, d/b/a Transit Authority of River City ("TARC") is a local governmental agency organized and existing pursuant to Chapter 96A, KY. REV. STAT. ("KRS"). In 1974, pursuant to the authority set out in KRS 96A.020, the City of Louisville and Jefferson County created TARC as an agency and instrumentality of the State of Kentucky. TARC is a mass transit facility created to serve the general public. It is an essential governmental function charged with the preservation and continuation of operation of mass transit facilities at reasonable rates to the public.

On or about September 1, 1974, TARC acquired the then privately owned Louisville Transit Company and Blue Motor Coach Company. Since that time, TARC has recognized Respondent, Division 1447, Amalgamated Transit Union, AFL-CIO (the "Union"), as a collective bargaining agent for a unit of its employees and has entered into three collective bargaining agreements with the Union, the last effective from September 1, 1977 through August 31, 1979.

In order to finance acquisition of the private companies, TARC sought federal grants under the Urban Mass Transportation Act of 1964, 49 U.S.C. §1601 *et seq.* ("UMTA"). Pursuant to 49 U.S.C. §1609(c) (hereinafter "§13(c) of UMTA"), recipients of these federal grants are obligated to make "protective arrangements" to protect the rights, privileges and benefits enjoyed by transit employees prior to the federally funded acquisition (App., p. 35). Section 13(c) of UMTA requires that protective arrangements be created to maintain the status quo existing at the time the grant is given. These protective arrangements include only:

> . . . such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits . . . under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individuals against a worsening of their position with respect to employment. (UMTA, §13(c); App., p. 35)

TARC and the Union entered into a private agreement (hereinafter the "§13(c) Agreement") in which TARC made the necessary "protective arrangements" required by UMTA (App., pp. 38-55). In the §13(c) Agreement, TARC recognized the Union as collective bargaining representative of a certain unit of TARC employees and agreed to preserve all rights, privileges and benefits in the then-existing collective bargaining agreement.

The §13(c) Agreement provided for resolution of "labor disputes," which could not be settled within thirty days, through submission to binding arbitration (App., p. 44).

The §13(c) Agreement, by its own terms, was not intended to create rights inconsistent with applicable state law:

> Nothing in this paragraph, or agreement, shall be construed to enlarge or limit the right of the employees covered by this agreement, or their employer, to utilize upon expiration of any collective bargaining agreement or otherwise any economic measures that are not inconsistent or in conflict with the collective bargaining agreement or applicable law. (§13(c) Agreement; App., p. 45).

In early August, 1979, TARC and the Union began negotiating a new collective bargaining agreement. Though progress was made toward a new collective bargaining agreement as late as November 5, 1979, the Union notified TARC on August 30, 1979 that an impasse existed and requested TARC to proceed to binding interest arbitration pursuant to the §13(c) Agreement.

On December 4, 1979, the Union broke off negotiations and filed a Complaint in the United States District Court for the Western District of Kentucky at Louisville (the "District Court"). The Union alleged that TARC refused to proceed to binding interest arbitration of disputed terms of a collective bargaining contract in violation of the §13(c) Agreement and, hence, UMTA. The Union invoked the District Court's federal question jurisdiction pursuant to 28 U.S.C. §1331(a) and 49 U.S.C. §1601 *et seq.* The Union sought declaratory judgment, damages and a preliminary and permanent injunction ordering TARC to proceed to arbitration. The Union filed a Motion for Preliminary Injunction with its Complaint.

On February 29, 1980, after a hearing, the District Court granted a Preliminary Injunction (App., pp. 24-25). The Preliminary Injunction ordered TARC and the Union to "submit to a Board of Arbitration selected in accordance with their Collective Bargaining Agreement" (App., p. 24).

On April 24, 1980, the District Court issued an Order Clarifying Preliminary Injunction stating that the arbitration shall proceed according to the terms of the §13(c) Agreement rather than according to the terms of the collective bargaining agreement (App., p. 34). TARC then appealed to the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit").

On July 28, 1981, the Sixth Circuit entered an Order affirming the District Court (App., pp. 21-23). The Sixth Circuit's Order directed TARC to submit to binding interest arbitration pursuant to the Preliminary Injunction of the District Court and §13(c) of UMTA. While §13(c) of UMTA does not provide for binding interest arbitration, the Sixth Circuit adopted the District Court's view that a violation of a §13(c) agreement implicitly violates §13(c) of UMTA (App., p. 22).

ARGUMENT

I. This Court Should Resolve a Conflict, Between Decisions of the Sixth and Eighth Circuits and a Decision of the First Circuit, Regarding Preemption of State Law by § 13(c) Agreements.

In its decision below, the Sixth Circuit ordered TARC to submit to binding interest arbitration in direct contravention of §250 of the Kentucky Constitution and various Kentucky statutes governing arbitration and mass transit. TARC argued against preemption in the Sixth Circuit, but the Court permitted the §13(c) Agreement to override conflicting Kentucky law. The Court cited, as controlling, another Sixth Circuit decision in which it discussed the preemption issue and ordered arbitration in an UMTA case. *Local Division 1285, Amalgamated Transit Union* v. *Jackson Transit Authority,* 650 F. 2d 1379 (6th Cir. 1981) (App., pp. 126-148).

In Division 1287, Amalgamated Transit Union v. *Kansas City Area Transportation Authority,* 582 F. 2d 444 (8th Cir. 1978), *cert. denied,* 439 U. S. 1090 (1979) (App., pp. 149-168), the Eighth Circuit ordered a transit authority to submit to binding interest arbitration pursuant to a §13(c) agreement which was invalid under Missouri law.

The foregoing decisions of the Sixth and Eighth Circuits are now in direct conflict with a recent decision of the United States Court of Appeals for the First Circuit. *Local Division 589, Amalgamated Transit Union* v. *Commonwealth of Massachusetts,* *et al.*, Nos. 81-1180, 81-1198 and 81-1219 (1st Cir. Sept. 30, 1981)[1] (App., pp. 62-125; hereinafter "*Massachusetts*"). In this decision, the First Circuit held that the assurances given to the Department of Labor in a §13(c) agreement do *not* preempt, or invalidate, conflicting state laws. The Court, after an exhaustive analysis of the legislative history behind §13(c) of UMTA, specifically refused to follow the contrary opinions of the Sixth and Eighth Circuits cited above:

> None of these opinions, however, consider the issue in depth, and we have determined not to follow them. (*Massachusetts, supra* at p. 40; App. p. 105)

Before examining this conflict, TARC will explain the preemptive effect, on Kentucky law, of the decision below.

A. *Preemption of Kentucky Law.* In the Sixth Circuit, TARC argued that provisions of the §13(c) Agreement should not preempt contrary provisions of Kentucky law. The Sixth Circuit nonetheless affirmed the order directing TARC to submit to binding interest arbitration, pursuant to the §13(c) Agreement, in violation of several Kentucky Constitutional and statutory provisions.

The Kentucky Constitution, §250, permits only the General Assembly of Kentucky to enact laws governing arbitration:

> It shall be the duty of the General Assembly to enact such laws as shall be necessary and proper

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[1] Released in published form.

> to decide differences by arbitrators, the arbitrators to be appointed by the parties who may choose that summary mode of adjustment. (§250, Ky. Const.; App., p. 56).

Nowhere in KRS Chapter 96A, governing mass transit authorities, has the General Assembly provided for arbitration of collective bargaining disputes. KRS 96A.200, the only "labor relations" provision in Chapter 96A, seeks only to protect existing rights and privileges of transit employees from being lost at the time of public acquisition:

> If an authority acquires an existing transit system, the authority shall assume and observe all existing labor contracts and pension obligations . . . The authority shall assume the obligations of any transit system acquired by it with regard to wages, salaries, hours, working conditions, sick leave, health and welfare and pension or retirement provisions for employees. (KRS 96A.200; App., p. 60).

The decision below orders action in derogation of Kentucky's arbitration statute, KRS 417.010:

> Any controversy that might be the subject of an action may be submitted, by written agreement of the parties to the controversy, to one or more arbitrators for decision, or to two arbitrators with provision for an umpire to be selected by the two arbitrators if they disagree. The agreement of submission shall be binding on the parties thereto

> if it states the matter submitted and who are to be the arbitrators. (KRS 417.010; App., p. 56)

KRS 417.010 does not authorize agreements to arbitrate future disputes. *Fite and Warmath Construction Co., Inc.* v. *MYS Corp.*, 559 S. W. 2d 729 (Ky. 1977). When TARC and the Union entered into the §13(c) Agreement, no dispute existed between them. Accordingly, the order directing TARC to submit to binding interest arbitration pursuant to the §13(c) Agreement violates KRS 417.010.

The decision below orders action in derogation of KRS 96A.360 which limits the power of a transit authority to make appropriations without approval of the governing public bodies:

> Such annual budget may be approved or disapproved by such public body or public bodies [City of Louisville and Jefferson County], or may be caused by such public body or public bodies to be revised, amended, or otherwise altered in the sound discretion of such public body or public bodies. (KRS 96A.360; App., p. 61).

The decision below makes no provision for approval by the governing public bodies.

The decision below orders TARC to submit to binding interest arbitration with respect to the compensation of its employees. Pursuant to KRS 96A.070(6), only the TARC Board is empowered to fix salaries, wages or other compensation of its employees:

> The board shall fix the salaries, wages or other compensation of the officers, agents and employees

> whom it may engage from time to time. (KRS 96A.070(6); App., p. 58)

This Court should grant a writ of certiorari to decide whether §13(c) agreements were intended to preempt conflicting state law. The Circuits are sharply split on this question.

B. *Upholding Preemption.* In *Division 1287, Amalgamated Transit Union* v. *Kansas City Area Transportation Authority,* 582 F. 2d 444 (8th Cir. 1978), *cert. denied,* 439 U. S. 1090 (1979) (App., pp. 149-168; hereinafter "*Kansas City I*"), the Eighth Circuit upheld an order directing the Kansas City Area Transportation Authority ("KCATA") to submit to binding interest arbitration of a collective bargaining agreement. KCATA argued that the parties' §13(c) agreement was invalid under Missouri law. The Court rejected KCATA's argument that Missouri law controls:

> The Authority contends here that any obligation on its part of [sic] engage in binding interest arbitration would amount to an unlawful delegation of the powers and authority that have been conferred upon it as a public body. We do not think that this argument can be sustained in the contest of the present case.
>
> * * *
>
> We recognize that under the laws of some states employees of public agencies are not accorded collective bargaining rights nor do they enjoy the benefits of such bargaining, including arbitration.

> We think, however, that when a state or a combination of states forms a public transit agency for the express purpose of obtaining federal money to enable it to take over the business of a private transit company, and where the agency in order to obtain the money enters into a §13(c) agreement that calls for interest arbitration, the obligation to arbitrate is binding on the agency, *regardless of general state law or policy.* (582 F. 2d at 452-3; App., p. 167; emphasis added)

The Union then brought an action against KCATA in federal district court for failure to pay increased pension benefits to retirees pursuant to an arbitration award. *Division 1287, Amalgamated Transit Union, AFL-CIO* v. *Kansas City Area Transportation Authority,* 485 F. Supp. 856 (W.D. Mo. 1980) (App. pp. 169-191; hereinafter *"Kansas City II"*). KCATA argued that the award of increased pension benefits to retirees violated Article VI, §25, of the Missouri Constitution. The district court cited the Eighth Circuit's decision in *Kansas City I* for the proposition that §13(c) agreements prevail over conflicting Missouri law:

> *This Court holds, without hesitation, that the contracts between the parties to this dispute must be interpreted and enforced under federal law, not the laws of the State of Missouri.* The various contracts between the KCATA and Local 1287 were executed pursuant to §13(c) of the UMTA. If those contracts are to serve the functions clearly indicated in both §13(c) and its legislative history,

> the interpretation of those contracts cannot be abandoned to the vagaries of State Law. *Central Airlines,* 372 U. S. 682, 691-695, 83 S. Ct. 956, 961-963, 10 L. Ed. 2d 67 (1963). *The Court of Appeals reached this same conclusion in KCATA I.* In that case, one point argued by the KCATA was that the binding interest arbitration agreement included in the parties' §13(c) agreement was invalid under Missouri law. KCATA I, 582 F. 2d 444, 452 (8th Cir. 1978). *The Court of Appeals rejected the KCATA's argument that Missouri law controls the validity of the parties' §13(c) agreement.* (485 F. Supp. at 863; App., pp. 185-186; emphasis added)

The Sixth Circuit is in agreement with the Eighth Circuit on the preemption issue.

In the decision below, the Sixth Circuit ordered TARC to submit to binding interest arbitration in clear contravention of Kentucky law. TARC had argued against preemption before the Sixth Circuit.

In *Jackson, supra,* the Sixth Circuit addressed the preemption issue and ordered the Jackson Transit Authority to submit to binding interest arbitration.

C. *Rejecting Preemption.* In *Local Division 589, Amalgamated Transit Union* v. *Commonwealth of Massachusetts, et al.,* Nos. 81-1180, 81-1198 and 81-1219 (1st Cir. Sept. 30, 1981) (App., pp. 62-125; "*Massachusetts*), the First Circuit held that §13(c) agreements do *not* preempt conflicting state law. This holding is in direct conflict with the Eighth Circuit's decision in *Kansas City I, supra,* and the Sixth Circuit's decisions below and in *Jackson, supra.*

In *Massachusetts, supra,* the State of Massachusetts enacted statutes requiring the Massachusetts Bay Area Transit Authority ("MBTA") to use an arbitration procedure different from the "interest arbitration" provided for in an existing §13(c) agreement. By enacting those statutes, the Massachusetts legislature was attempting to reduce transit costs by imposing conditions and limitations on MBTA arbitration (App., p. 68).

The union in *Massachusetts, supra,* contended that the assurances provided by the §13(c) agreement preempted applicable Massachusetts statutes, citing the Supremacy Clause, U. S. CONST., art. VI. A federal district court in Massachusetts issued a preliminary injunction ordering arbitration consistent with the §13(c) agreement and the MBTA appealed.

The First Circuit reached its decision only after an exhaustive examination of the legislative history behind §13(c) of UMTA. The Court found overwhelming evidence that Congress did *not* intend for §13(c) to preempt state laws. The Court quoted extensively from House and Senate committee debates, floor debates and committee reports in resisting the preemption argument (App., pp. 85-97). The Court, for example, found not a single Senator who intended §13(c) of UMTA to override conflicting state law (App., p. 97) and noted the following Senate committee report:

> In regard to the question as to whether these [§13(c)] provisions would supersede State labor

> laws, the committee concurs in a statement made by the Secretary of Labor "that there could be no superseding of State laws by a provision of this kind." *Senate Report,* No. 82, 88th Cong., 1st Sess. 29 (1963); (App., p. 88)

Ultimately, the First Circuit confronted *Kansas City I, supra,* and other Circuit decisions upholding preemption. The First Circuit pointedly refused to follows those decisions:

> None of these opinions, however, consider the issue in depth, and we have determined not to follow them.
>
> * * *
>
> For these reasons, we hold that the specific detailed assurances given by a union and a transit authority to the Labor Department under (UMTA) §13(c) do not invalidate a state law to the contrary. (App., p. 105)

II. The Sixth Circuit Erred by Improperly Invalidating Certain Kentucky Statutes Under the Supremacy Clause of the U. S. Constitution.

In *Perez* v. *Campbell,* 402 U. S. 637 (1971), this Court stated that federal preemption of state law occurs *only* where a state statute conflicts with a federal statute and is, hence, invalid under the Supremacy Clause of the United States Constitution, U. S. Const., art. VI.

As earlier noted, the decision below orders TARC to submit to binding interest arbitration in derogation of several Kentucky statutes dealing with arbitration laws, arbitration agreements and certain fiscal powers of mass transit authorities.

Section 13(c) of UMTA, however, does not require any form of arbitration. It requires only that a transit authority enter into "protective arrangements" to preserve employee rights under existing collective bargaining agreements (§13(c) of UMTA; App. p. 35). Accordingly, there is no actual conflict between the federal statute, §13(c) of UMTA, and the Kentucky statutes which bar submission of TARC's collective bargaining dispute to arbitration.

Admittedly, the §13(c) *Agreement,* which contains the "protective arrangements" mandated by UMTA, does provide for arbitration. The decision below holds that violation of a §13(c) Agreement is an implicit violation of UMTA itself. Congress, however, did not intend for §13(c) agreements to supersede state law.

In *Massachusetts, supra,* the First Circuit correctly held that Congress intended for state law to prevail over conflicting protective arrangements made pursuant to §13(c) of UMTA:

> To decide the Supremacy Clause question, we have examined the UMTA statutory scheme in light of its legislative history and prior case law. Our examination convinces us that Congress intended state law, not §13(c) assurances, to prevail in case of a conflict. (*Massachusetts, supra,* at p. 20; App., p. 84)

As noted, this decision was rendered after an exhaustive study of the legislative history behind §13(c) of UMTA (App., pp. 85-97).

In *Schwartz* v. *Texas*, 344 U. S. 199 (1952), this Court held that federal preemption of state law should not be found where, as here, Congress did not intend to preempt state law:

> If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of the intention to do so. The exercise of federal supremacy is not lightly to be presumed. (344 U. S. at 202-203)

Further, the §13(c) Agreement, by its own terms, was not intended to create rights which were *"inconsistent or in conflict with . . . applicable law"* (App., p. 45).

III. The Sixth Circuit Erred by Sanctioning an Intrusion of Federal Law Into the Protected Area of State Sovereignty in Violation of the Tenth Amendment to the U. S. Constitution.

In *United Transportation Union* v. *Long Island Rail Road Co.*, 634 F. 2d 19 (2nd Cir. 1980), the Second Circuit recognized that local public mass transit operations are integral governmental functions which fall into the protected area of state sovereignty, despite the existence of conflicting federal labor relations legislation.

In *Long Island,* the Court faced the question of whether employees of the Long Island Rail Road Company ("LIRR") were subject to a New York statute, N.Y. Civ. Serv. Law §§200-214, prohibiting strikes by public employees, or a federal statute, the Railway Labor Act, 45 U.S.C. §§151 *et seq.,* which permits strikes by railway employees. Citing this Court's decision in *National League of Cities* v. *Usery,* 426 U. S. 833 (1976), the Second Circuit concluded that the federal statute impaired New York's ability to structure employer-employee relationships in its role as sole provider of an essential public service. 634 F. 2d at 20.

In *National League of Cities, supra,* this Court relied upon the Tenth Amendment to the U. S. Constitution as the source of a state sovereignty limitation upon congressional power. U. S. CONST., amend. 10.

As in *Long Island, supra,* the case at bar involves a conflict between federal labor relations legislation and the right of a state to regulate local mass transit operations. The Sixth Circuit, by its decision below, has sanctioned an impermissible federal intrusion into the protected area of state sovereignty over integral governmental functions.

IV. The Federal Courts Lacked Subject Matter Jurisdiction Over This Action.

The Sixth Circuit erred in upholding the District Court's finding of subject matter jurisdiction to hear this case.

In the District Court, the Union asserted subject matter jurisdiction under 28 U.S.C. §1331(a), claiming that its cause of action arose out of federal law, UMTA. This dispute, however, does not arise out of UMTA within the meaning of the federal question statute.

Pursuant to the Supreme Court's decision in *Gully* v. *First National Bank in Meridian,* 299 U. S. 109 (1936), federal question jurisdiction exists where a federal law constitutes an essential element of the plaintiff's cause of action. 299 U. S. at 112. This Court held that, for federal question jurisdiction to attach, the claim must not merely originate in federal law but must "substantially involve[s] a dispute or controversy respecting the validity, construction or effect of such a law . . ." 299 U. S. at 114.

Although the §13(c) Agreement was entered into pursuant to §13(c) of UMTA, the entitlement to binding interest arbitration does not in any way depend upon the validity, construction or effect of UMTA. UMTA makes no provision for a right to binding interest arbitration. Further, the legislative history of UMTA demonstrates that §13(c) was intended to preserve *existing* rights at the time of acquisition, not create new rights. Where, as here, no right to binding interest arbitration existed at acquisition, no federal right to arbitration can be created by any construction of UMTA.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Order of the U. S. Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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RULE 28.4 RECITATION

The provisions of 28 U.S.C. §2403(a) may apply. Petitioner challenges 49 U.S.C. §1609(c) on Constitutional grounds. No court of the United States has made a certificate pursuant to 28 U.S.C. §2403(a) or (b).

Appendix

No. 80-3203

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Division 1447, Amalgamated Transit Union,
AFL-CIO, - - - - - - *Plaintiff-Appellee,*

v.

Louisville and Jefferson County Transit
Authority, d/b/a Transit Authority of
River City, - - - - *Defendant-Appellant.*

ORDER—Filed July 28, 1981

Before: Weick, Keith and Jones, Circuit Judges

Louisville and Jefferson County Transit Authority, d/b/a Transit Authority of River City (TARC) appeals from an order of the district court granting Division 1447, Amalgamated Transit Union, AFL-CIO's (the Union) motion for a preliminary injunction and ordering TARC and the Union to submit the disputed terms of a collective bargaining agreement to binding interest arbitration.

The Union is an unincorporated labor organization representing workers in the transit industry for the purpose of collective bargaining. TARC, through its management agent, operates the Louisville and Jefferson County transit system. TARC is the successor company to two private transit companies.

In 1974, TARC applied to the U. S. Government for a capital improvement grant under the UMTA of 1964, 49 U.S.C. §1601, *et seq.*, to assist TARC in the acquisition of privately-owned bus companies, the purchase of new transit coaches and the purchase of other equipment.

On February 26, 1974, TARC and the Union entered into an agreement as required by §13(c) of the UMTA (the §13(c) Agreement).

On February 5, 1976, the parties entered into the so-called "National §13(c) Agreement" which applies to operating assistance only, but which includes paragraph 11 in the addendum to the agreement.

The last collective bargaining agreement between the parties expired on August 31, 1979. Prior to August 31, TARC and the Union tried to negotiate a new labor agreement. It appears that the parties continued to bargain until November 6, 1979, when an impasse was reached over issues of wages, pensions, cost-of-living allowances, and part-time employees.

On December 4, 1979, the Union brought this action against TARC for a declaratory judgment, injuntive relief, damages and attorney fees with respect to TARC's refusal to proceed to arbitration of the disputed terms of a collective bargaining agreement in violation of the Urban Mass Transportation Act (UMTA) and the parties' agreements thereunder.

On February 29, 1980, the district court granted the preliminary injunction and ordered the parties "to submit to a Board of Arbitration selected in accordance with their Collective Bargaining Agreement." The district court concluded that it had subject matter jurisdiction under 28 U.S.C. §1331 and under the UMTA. Furthermore, the district court held that TARC's violation of the parties' section 13(c) Agreement implicitly violated section 13(c) itself. Finally, the district court decided that the Union is a beneficiary of the expired labor agreement and, as a consequence, will suffer irreparable injury unless the §13(c) Agreement is enforced.

On April 24, 1980, in recognition of an error it made, the district court issued an Order Clarifying Preliminary

Injunction stating that the arbitration ordered "shall proceed according to the expressed terms of the 1974 Section 13(c) Agreement rather than as per the Collective Bargaining Agreement."

During the pendency of this case, this Court settled the conflict in this Circuit concerning the existence of subject matter jurisdiction and the propriety of interest arbitration. In *Local Div. 1285, Amalgamated Transit Union* v. *Jackson Transit Authority,* No. 78-1185 (6th Cir., filed June 3, 1981), in a similar action, we held *inter alia,* that federal courts have subject matter jurisdiction to entertain cases arising under section 13(c) agreements and the UMTA. On the same day, we also decided that a Union's claim based upon an alleged violation of its right to interest arbitration stated a cause of action under federal law for which relief can be granted in federal court. *Division 1235, Amalgamated Transit Union* v. *Metropolitan Transit Authority, et al.,* No. 79-1511 (6th Cir.). Consequently, the district court's finding of subject matter jurisdiction and order compelling collective bargaining on binding interest arbitration were proper. We believe that the district court's order granting preliminary injunction is appropriate.

Accordingly, the judgment of the district court is AFFIRMED and the case is REMANDED for proceedings consistent herewith.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman
Clerk

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 79-0629 L(A)

DIVISION 1447, AMALGAMATED TRANSIT UNION,
AFL-CIO, - - - - - - - - *Plaintiff,*

v.

LOUISVILLE AND JEFFERSON COUNTY TRANSIT
AUTHORITY, d/b/a TRANSIT AUTHORITY OF
RIVER CITY and
ATE MANAGEMENT AND SERVICE COMPANY, - *Defendants.*

PRELIMINARY INJUNCTION—Entered February 29, 1980

This action, having been submitted to the Court on the motion of the plaintiff for preliminary injunction, and the Court, having considered the evidence produced by the parties, the briefs and oral arguments, and being fully advised in the premises, and having entered its findings of fact, conclusions of law and memorandum opinion,

IT IS ORDERED AND ADJUDGED that the plaintiff and the defendant, Louisville and Jefferson County Transit Authority, d/b/a Transit Authority of River City, submit to a Board of Arbitration selected in accordance with their Collective Bargaining Agreement which Board of Arbitration shall have the power to determine a just and equitable Collective Bargaining Agreement for the arbitrating parties.

IT IS FURTHER ORDERED AND ADJUDGED that the submission to an arbitrator or Board of Arbitration for its decision as to what shall constitute the new Collective Bargaining Agreement shall not constitute a bar to the right of the parties to continue to bargain with respect to the making of a new Collective Bargaining Agreement.

It Is Further Ordered and Adjudged that the parties shall initiate steps to set in process the arbitration procedures within 10 days after entry of this preliminary injunction.

It Is Further Ordered and Adjudged that the motion of the defendant, ATE Management and Service Company, to be dismissed from this action be and it is hereby reserved for further orders of this Court.

Dated 2/29/80

(s) Charles M. Allen
Chief Judge

cc: Counsel of Record

IN THE

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FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

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AFL-CIO, - - - - - - - *Plaintiff,*

v.

LOUISVILLE AND JEFFERSON COUNTY TRANSIT
AUTHORITY, d/b/a TRANSIT AUTHORITY OF
RIVER CITY and
ATE MANAGEMENT AND SERVICE COMPANY, - *Defendants.*

FINDINGS OF FACT, CONCLUSIONS OF LAW AND MEMORANDUM OPINION—Entered February 29, 1980

This action is submitted to the Court on the motion of the plaintiff for a preliminary injunction, the Court having previously overruled the motion of defendants to dismiss this action. Jurisdiction of this action is vested in the Court by virtue of 28 U.S.C. Sec. 1331 and 49 U.S.C. Sec. 1601 et seq., as amended, which is known as the Urban Mass Transportation Act, hereinafter referred to as UMTA. See *Division 519, Amalgamated Transit Union* v. *LaCrosse Municipal Transit Utility,* 445 F. Supp. 798 (W.D. Wisc. 1977), aff'd. 585 F. 2d 1340 (7th Cir. 1978); *Division 1287, Amalgamated Transit Union* v. *Kansas City Area Transportation Authority,* 582 F. 2d 444 (8th Cir. 1978), cert. denied ____ U. S. ____ (1979), 99 S. Ct. 872; *Division 714,* *Amalgamated Transit Union* v. *Greater Portland Transit District*, 589 F. 2d 6 (1st Cir. 1979).

It should be observed that nine other federal court decisions have already been rendered in this litigious field, and that there exists a split of authority on the question of jurisdiction, but this Court is convinced that the decisions cited above represent the sounder approach to a somewhat worrisome problem. It should also be observed that three district courts in the Sixth Circuit have already considered this question and that Judge Frank Wilson, in the case of *Division 1212, Amalgamated Transit Union* v. *Chattanooga Area Regional Transportation Authority*, No. CIV-1-79-212 (E.D. Tenn.) and Judge Thomas Wiseman, Jr., in the case of *Division 1235, Amalgamated Transit Union* v. *Metropolitan Transit Authority, et al.*, No. 79-3275 (M.D. Tenn.) have reached the same conclusion as has this Court, whereas District Judge Harry Welford of the Western District of Tennessee has reached an opposite conclusion in the case of *Local Division 1285, Amalgamated Transit Union* v. *Jackson Transit Union* v. *Jackson Transit Authority* [sic], 447 F. Supp. 88 (W.D. Tenn. 1977), which has been pending on appeal to the United States Court of Appeals for the Sixth Circuit since August, 1978.

Prior to 1974, transit service in Louisville and Jefferson County, Kentucky was provided by two private companies, the Louisville Transit Company and Blue Motor Coach Company. In 1974, the defendant Transit Authority of River City, known as TARC, was created under Kentucky law and applied for a federal grant under UMTA in order to purchase the two private companies and provide transit service.

In 1974 TARC entered into a Collective Bargaining Agreement with the plaintiff union, Paragraph 11 of which provided as follows:

> "In the event of any labor dispute involving the Public Body and the employees covered by this agreement which cannot be settled within thirty (30) days after such dispute first arises, such dispute may be submitted at the written request of either the Union or the Public Body to a board of arbitration selected in accordance with the existing collective bargaining agreement if any, or if none, as hereinafter provided. . . . The term 'labor dispute' shall be broadly construed and shall include, but not be limited to, any controversy concerning wages, salaries, hours, working conditions or benefits, including health and welfare, sick leave, insurance or pension and retirement provisions, the making or maintaining of collective bargaining agreements, any grievances that may arise, and any controversy arising out of or by virtue of any provisions of this agreement. Nothing in this paragraph, or agreement, shall be construed to enlarge or limit the right of the employees covered by this agreement, or their employer, to utilize upon expiration of any collective bargaining agreement or otherwise any economic measures that are not inconsistent or in conflict with the collective bargaining agreement or applicable law."

Prior to 1974, there had been no agreement between the union and the two private transit companies which provided for what is known as "interest arbitration." It is apparent from reading Paragraph 11 of the Collective Bargaining Agreement of 1974 that the parties contemplated that interest arbitration would be an integral part of their contract. At oral argument counsel for defendants contended that the last sentence of Paragraph 11, in effect, nullified the preceding sentences, in that it made the right of the parties to interest arbitration dependent upon state law and that Kentucky law prevented the defendants from entering into an interest arbitration agreement. That argument is without merit as may be seen upon a close reading of the last sentence.

Finally, in 1976 TARC agreed to what is known as the "National 13(c) Agreement" which applies to operating assistance only, but which includes Paragraph 11 in the Addendum to the National Agreement. The last collective bargaining agreement between the parties expired on August 31, 1979, the 1974 Agreement having been superseded by an Agreement entered into on September 25, 1977. Prior to August 30, 1979 and since that time, the parties have been negotiating concerning the making of a new collective bargaining agreement. As early as August 30, 1979 and again on September 12, 1979, the union demanded binding arbitration which would end in the making of a new collective bargaining agreement. These offers were refused, and defendants now contend that the demands made by the plaintiff-union have been so outrageous that the union is guilty of bad faith bargaining and, therefore, cannot come into this Court and demand equitable relief under the "clean hands" doctrine.

To resolve this question resort must be had to the express language of the contract between the parties. The Collective Bargaining Agreement refers to any labor dispute involving the parties which cannot be settled within 30 days after the dispute arises. The Agreement does nothing more than require a labor dispute and its existence for 30 days or more. It does not require bargaining in good faith but merely the existence of a labor dispute. The Court has examined other contracts between other transit unions and transit authorities and has found that some of them do require bargaining in good faith before arbitration can be required. Failure of defendants to insist upon such a provision in their Agreement is fatal to their defense of bad faith bargaining. They, like the plaintiff, are locked into the specific terms of their Agreement.

Defendants contend that the plaintiff has not stated a cause of action under UMTA and under Section 13(c) of that Act. Title 42 U.S.C. Sec. 1609(c), Sec. 13(c) of the Act provides as follows:

> "(c) It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; and (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or restraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements."

Defendants contend that it was the intent of UMTA, and particularly Section 13(c), to protect employees against a worsening of their rights, and that since the employees had no interest arbitration in their Collective Bargaining Agreements with the private transit companies, that they are not entitled to use this provision of the Collective Bargaining Agreement to bring into play the jurisdiction of federal courts and their injunctive powers to enforce such an Agreement. The answer to that contention was ably discussed by District Judge Wiseman in the case of *Division 1235, Amalgamated Transit Union* v. *Metropolitan Transit Authority, et al, supra.* This Court adopts the reasoning of Judge Wiseman by reference.

The defendants also contend that plaintiff is not entitled to a preliminary injunction because plaintiff is seeking monetary relief. While that argument has considerable theoretical appeal, it does not persuade the Court, especially in view of the fact that the parties have had an opportunity to fully develop by depositions and discovery the factual background of this dispute. Furthermore, in *Division 519 Amalgamated Transit Union* v. *LaCrosse Municipal Transit Utility, supra,* the Seventh Circuit upheld Judge Doyle in his granting of a preliminary injunction to the union requiring interest arbitration.

As stated by District Judge Wiseman, defendants have violated their Section 13(c) Agreements, and in so doing, they have implicitedly [sic] violated Section 13(c) itself. As Judge Wiseman also stated, that decision is contrary to the decision in *Division 580, Amalgamated Transit Union, AFL-CIO* v. *Central New York Regional Transportation Authority,* 556 F. 2d 659 (2nd Cir. 1977). Examination of these two decisions and of the other decisions, both pro and con, convince this Court that the reasoning of Judge Wiseman is more persuasive and should be followed.

While defendants would like to have this case interpreted as being between private parties and subject only to Kentucky law, the Seventh Circuit Court in *LaCrosse, supra,* used the following applicable language in rejecting such a contention:

> "Because Sec. 13(c) mandates a 'fair and equitable arrangement' that meets the approval of the Secretary of Labor, *the exact and concrete terms of an arrangement define the more general requirements of the statutory provision.* The approval of the Secretary stamps the 13(c) agreement as something more than a mere private contract formulated under the aegis of a federal statute. Instead, the contract is infused with statutory prerequisites. Clearly, then, the terms written into a 13(c) agreement are grounded in federal law." 585 F. 2d, at 1346 (emphasis added).

The Court observes that the members of the plaintiff-union are working for the same wages and under the same conditions now as they were almost five months ago when the Collective Bargaining Agreement expired. It is apparent that there is a need for resolution of this labor dispute and that that need at the present apparently can only be met by interest arbitration. It is apparent also that the members of plaintiff-union are beneficiaries of the Collective Bargaining Agreement and will suffer irreparable injuries unless the 13(c) Agreement is enforced. See *Division 519 Amalgamated Transit Union* v. *LaCrosse Municipal Transit Utility, supra,* and *Division 1235, Amalgamated Transit Union* v. *Metropolitan Transit Authority, et al, supra.*

It is also apparent that plaintiff's chances of success on the merits are great and that the public interest will be served by the activation of the arbitration machinery, laborious though it may be. Of course, the parties still retain the right to settle their dispute at any time prior to the final resolution of their dispute by arbitration.

An order in conformity with this opinion has been entered this day.

Dated 2/29/80

(s) Charles M. Allen
Chief Judge

cc: Counsel of Record

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C-0629-L(A)

DIVISION 1447, AMALGAMATED TRANSIT UNION,
AFL-CIO, - - - - - - - *Plaintiff,*

v.

LOUISVILLE AND JEFFERSON COUNTY TRANSIT
AUTHORITY, d/b/a TRANSIT AUTHORITY OF
RIVER CITY and
ATE MANAGEMENT AND SERVICE COMPANY, - *Defendants.*

ORDER CLARIFYING PRELIMINARY INJUNCTION—

Entered April 24, 1980

This matter, having been submitted to the Court on motion of the Plaintiff to clarify the preliminary injunction which was issued by this Court on February 29, 1980, said motion being supported by appropriate memoranda, and the Defendants having responded thereto, and the Court being duly and sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED THAT this Court's preliminary injunction which was issued on February 29, 1980 is hereby clarified to state that the arbitration proceeding that this Court ordered shall proceed according to the expressed terms of the 1974 Section 13(c) Agreement, rather than as per the Collective Bargaining Agreement.

(s) Charles M. Allen
United States District Judge

Date 4/24/80

URBAN MASS TRANSPORTATION ACT
49 U.S.C. § 1609(c)

§ 1609. Labor standards

* * * * * * *

Interests of employees; protective arrangements; terms and conditions

(c) It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.

Pub.L. 88–365, § 13, formerly § 10, July 9, 1964, 78 Stat. 307, renumbered and amended Pub.L. 89–562, § 2(a)(1), (b)(2), Sept. 8, 1966, 80 Stat. 715, 716; Pub.L. 90–19, § 20(a), May 25, 1967, 81 Stat. 25.

RESOLUTION

Whereas, management and legal counsel for the Transit Authority of Louisville and Jefferson County have presented to the Executive Committee of the Board a 13(c) agreement, which has been finalized after meetings between the Transit Authority of Louisville and Jefferson County and local and international representatives of the Amalgamated Transit Union; and

Whereas, the 13(c) agreement as attached to the Resolution is recommended for signature by both legal counsel and management as being in the best interest of the Authority;

Now, Therefore, The Board of Directors of the Transit Authority of Louisville and Jefferson County does hereby order and resolve as follows:

1. That Charles W. Mann, Executive Director of the Transit Authority of Louisville and Jefferson County, be authorized to execute for and on behalf of the Authority the 13(c) Agreement with Local Division 1447, Amalgamated Transit Union AFL-CIO, which agreement is attached hereto and incorporated by reference as if fully set out herein.
2. That Charles W. Mann immediately forward the executed copies of the 13(c) Agreement to Ernest F. Judd, Local 1447 Financial Secretary for the signature of his union and that said executed copies of the 13(c) Agreement be then forwarded as quickly as possible to Mr. Alexander Cohn, Legal Counsel for the ATU International for submission to the U. S. Department of Labor, with a request for certification.

Adopted by the majority vote of the Executive Committee of the Board of Directors of the Transit Authority of Louisville and Jefferson County of a meeting held on the

18th day of February, 1974, on the same occasion signed by the members of said committee (present and voting) in open session as evidence of its approval.

Approved:

/s/ H. Dean Burgiss, Chairman
/s/ William Jones, Vice-Chairman
/s/ Nelle Horlander, Secretary-Treasurer
/s/ William Conley

§ 13(c) AGREEMENT

AGREEMENT PURSUANT TO SECTION 13(c) OF THE URBAN MASS TRANSPORTATION ACT OF 1964, AS AMENDED.

WHEREAS, the Transit Authority of Louisville and Jefferson County, Kentucky ("Public Body"), has filed an application under the Urban Mass Transportation Act of 1964, as amended ("Act"), for a capital grant to assist in the acquisition of the Louisville Transit Company ("Company") and Blue Motor Coach Company, the purchase of new transit coaches, revenue collection equipment, service and maintenance equipment, radio system, and other transit related equipment, as more fully described in the project application ("Project"); and

WHEREAS, employees of the Company are represented by Local Division 1447 Amalgamated Transit Union, AFL-CIO ("Union"), and employees of Blue Motor Coach Company are presently unrepresented by a labor organization; and

WHEREAS, upon public acquisition of the transit companies the Public Body will retain a management company ("Management Company") to operate the unified publicly-owned transit system; and

WHEREAS, §§3(e)(4) and 13(c) of the Act require, as a condition of assistance thereunder, that fair and equitable arrangements be made as determined by the Secretary of Labor, "to protect the interests of employees affected by such assistance"; and

WHEREAS, the parties have agreed upon the following arrangements as fair and equitable;

NOW, THEREFORE, it is agreed that in the event this Project is approved for assistance under the Act, the following terms and conditions shall apply:

(1) The Project shall be carried out in such a manner and upon such terms and conditions as will not in any way adversely affect employees covered by this agreement.

(2) All rights, privileges, and benefits (including pension rights and benefits) of employees covered by this agreement (including employees having already retired) under existing collective bargaining agreements or otherwise, or under any revision or renewal thereof, shall be preserved and continued; provided, however, that such rights, privileges and benefits not previously vested may be modified by collective bargaining and agreement by the operator of the transit system and the Union to substitute rights, privileges and benefits of equal or greater economic value.

(3) The collective bargaining rights of employees represented by the Union, including the right to arbitrate labor disputes and to maintain union security and checkoff arrangements, as provided by applicable laws, policies and/or existing collective bargaining agreements shall be preserved and continued. The Public Body agrees that it will bargain collectively with the Union or otherwise arrange for the continuation of collective bargaining, and that it will enter into agreements with the Union or arrange for such agreements to be entered into, relative to all subjects which are or may be proper subjects of collective bargaining with a private employer

(4) All persons who are employees of the acquired system covered by this agreement on the date of acquisition shall be offered employment by the Public Body under the terms and conditions of this agreement and any then-applicable collective bargaining agreement. Each employee shall retain the seniority he has with the respective company for which he worked as of the date of the acquisition and all employees shall be integrated into the general seniority roster of the Public Body. Thereafter, such

roster may not be changed as to the status of employees as of the date of the roster, except upon mutual agreement by the employee, the Union and the Public Body.

(5) All of the employees of the acquired transportation system in the bargaining unit shall be appointed to comparable positions on the publicly-owned system without examination, and these employees shall be credited with their years of service with respect to the transit system for purposes of sick leave, seniority, vacation and pension, in accordance with the records and labor agreements of the acquired transportation system. Members and beneficiaries of any pension or retirement system, or other benefits established by that transportation system shall continue to have the rights, privileges, benefits, obligations and status with respect to such established system. The operator of the publicly-owned transit system shall assume the obligations of the acquired system with regard to wages, salaries, hours, working conditions, sick leave, health and welfare and pension or retirement fund provisions for employees. No employee of the acquired system shall suffer any worsening of his wages, seniority, pension, sick leave, vacation, health and welfare, insurance, or any other benefits by reason of his transfer to a position on the publicly-owned system.

(6) Any employee covered by the agreement who is laid off or otherwise deprived of employment (except in the event of his resignation, death, retirement or dismissal for cause in accordance with the working agreement) or placed in a worse position with respect to compensation, hours, working conditions, fringe benefits, or rights and privileges pertaining thereto at any time during his employment as a result of the Project, including any program of efficiencies or economies directly or indirectly related thereto, shall be entitled to receive any applicable rights, privileges and benefits as specified in the employee protective arrange-

ments (attached hereto and made a part hereof as Exhibit "A"); provided, however, that nothing in Exhibit "A" shall be deemed to supersede or displace any other provisions of this agreement, and in the event of any conflict or inconsistency between them the other provisions of this agreement shall control.

(7) The Public Body shall be financially responsible for the application of these conditions and will make the necessary arrangements with the Union to provide for a mutually satisfactory claims handling procedure under this agreement. In the case of an adversely affected employee, the Public Body will either honor such claim, giving reasons therefor. In the event the Public Body fails to honor such claim, the Union may invoke the following procedures for further joint investigation of the claim by giving notice of its desire to pursue such procedures. Within ten (10) days from the receipt by the Public Body of such notice, the parties shall exchange such factual information as may be available to them relevant to the disposition of the claim and shall jointly take such steps as may be necessary or desirable to obtain from any third parties such additional factual information as may be relevant. As soon as practicable thereafter, the parties shall meet and attempt to agree upon the proper disposition of the claim. If no such agreement is reached, and the Public Body decides to reject the claim, it shall give written notice of its final rejection of the claim, detailing its reasons therefor. In the event the claim is so rejected by the Public Body, the claim may be processed to arbitration as provided by paragraph (11) of this agreement. Throughout the claims handling and arbitration procedures, the Public Body shall have the burden of affirmatively establishing that any deprivation of employment, or other worsening of employment position, has not been a result of the Project, by proving that only factors other than the Project affected the employee.

(8) Any employee in the bargaining unit represented by the Union who has been terminated or laid off for lack of work shall be granted priority of employment or reemployment to fill any vacant position on the transit system for which he is, or by training or re-training can become, qualified. In the event training or re-training is required by such employment or reemployment, the Public Body shall provide or provide for such training or re-training at no cost to the employee, and such employee shall be paid, while training or re-training, the salary or hourly rate of his former job classification or the training, whichever is higher.

(9) Employees of the Public Body covered by this agreement will be given the first opportunity for employment in any new jobs, included in the bargaining unit or comparable to those included in the bargaining unit, created as a result of the Project for which they are, or by training or re-training can become, qualified. All such jobs shall be filled in accordance with seniority and allocated on a fair and equitable basis under arrangements to be mutually determined by the Public Body and the Union prior to the filling of such jobs, or by arbitration at the request of either party, if such arrangements are not agreed upon prior to such date. The Public Body will not tender such jobs to any other individual or individuals so long as there are members of the bargaining unit who are qualified, or after a reasonable training period can become qualified, and are willing to bid these jobs.

The Public Body or other operator of the transit system, will give written notice to the Union prior to commencing any new operations which create additional jobs in the bargaining unit, and the parties shall thereafter meet at mutually agreeable times to negotiate concerning the details of preferential employment opportunity plan, and the wages, hours, and working conditions for employees assigned to such new operations. Any agreement reached upon such provisions shall be executed by all parties and made a part of this agreement. In the event the parties are unable to agree upon such provisions, the dispute may be submitted to arbitration as hereinafter provided.

(10) In the event the Public Body contemplates any change in its organization or operation which will result in the dismissal (except in the event of dismissal for cause in accordance with the working agreement) or displacement of employees, or rearrangement of the working forces represented by the Union as a result of the Project, the Public Body shall give reasonable written notice of such intended change to the Union. Such notice shall contain a full and adequate statement of the proposed changes to be effected, including an estimate of the number of employees of each classification affected by the intended changes. Thereafter, within thirty (30) days from the date of said notice, the Public Body and the Union shall meet for the purpose of reaching agreement with respect to the application of the terms and conditions of this agreement to the intended changes. Any such change involving a dismissal, displacement, or rearrangement of the working forces represented by the Union shall provide for the selection of forces from the employees represented by the Union on bases accepted as appropriate for application in the particular case; and any assignment of employees made necessary by the intended changes shall be made on the basis of an agreement between the Public Body and the Union. In the event of a failure to agree, the dispute may be submitted to arbitration by either party pursuant to paragraph (11) of this agreement. In any such arbitration, the terms of this agreement are to be interpreted and applied in favor of providing employee protections and benefits no less than those established pursuant to §5(2)(f) of the Interstate Commerce Act.

(11) In the event of any labor dispute involving the Public Body and the employees covered by this agreement which cannot be settled within thirty (30) days after such dispute first arises, such dispute may be submitted at the written request of either the Union or the Public Body to a board of arbitration selected in accordance with the existing collective bargaining agreement if any, or if none, as hereinafter provided. The Public Body and the Union shall each, within ten (10) days, select one member of the arbitration board and the two members thus chosen shall select a third member who shall serve as chairman. Should the two members be unable to agree upon the appointment of the neutral member within ten (10) days, either party may request the American Arbitration Association to furnish a list of five (5) persons from which the neutral member shall be selected. The parties shall, within five (5) days after the receipt of such list determine by lot the order of elimination, and thereafter each shall, in that order, alternately eliminate one name until only one name remains. The remaining person on the list shall be the neutral member. The decision by majority vote of the arbitration board shall be final, binding and conclusive and shall be rendered within forty-five (45) days from the date the neutral member is appointed. Awards made pursuant to said arbitration may include full back pay and allowances to employee-claimants. The salaries and expenses of the neutral member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them. The term "labor dispute" shall be broadly construed and shall include, but not be limited to, any controversy concerning wages, salaries, hours, working conditions or benefits, including health and welfare, sick leave, insurance or pension and retirement provisions, the making or maintaining of collective bargaining agreements, any grievances that may arise, and any controversy arising out of or by virtue of

any provisions of this agreement. Nothing in this paragraph, or agreement, shall be construed to enlarge or limit the right of the employees covered by this agreement, or their employer, to utilize upon expiration of any collective bargaining agreement or otherwise any economic measures that are not inconsistent or in conflict with the collective bargaining agreement or applicable law.

(12) Nothing in this agreement shall be construed as an undertaking by the Union or the employees covered by this agreement to forego any rights or benefits under any other agreement or under any provision of law.

(13) The term "Project", as used in this agreement, shall not be limited to the particular facility assisted by federal funds, but shall include any changes, whether organizational, operational, provided, whether they are the subject of the grant contract, reasonably related thereto, or faciliated thereby. The phrase "as a result of the Project" shall, when used in this agreement, include events occurring in anticipation of, during, and subsequent to the Project.

(14) This agreement shall be binding upon the successors and assigns of the parties hereto, and no provisions, terms, or obligations herein contained shall be affected, modified, altered or changed in any respect whatsoever by reason of the arrangements made by or for the Public Body to manage and operate the system. Any person, enterprise, body, or agency, whether publicly or privately owned, which shall undertake the management or operation of the transit system, shall agree to be bound by the terms of this agreement and accept the responsibility for full performance of these conditions.

(15) The employees in the bargaining unit represented by the Union shall continue to receive coverage under Social Security, Workmen's Compensation, unemployment compensation, and the like. In no event shall these benefits be worsened as a result of the Project.

(16) In the event any provision of this agreement is held to be invalid, or otherwise unenforceable under the federal, State, or local law, such provision shall be renegotiated for purpose of adequate replacement under Section 13(c) of the Act. If such negotiation shall not result in mutually satisfactory agreement, either party may invoke the jurisdiction of the Secretary of Labor to determine substitute fair and equitable employee protective arrangements which shall be incorporated in this agreement and any other appropriate action, remedy, or relief.

(17) If this Project is approved for assistance under the Act, the foregoing terms and conditions shall be made part of the contract of assistance between the Federal Government and the applicant for federal funds, provided, however, that this agreement shall not merge into the contract of assistance, but shall be independently binding and enforceable by and upon the parties hereto, in accordance with its terms; nor shall the collective bargaining agreement between the Union and the operator of the transit system merge into this agreement but each shall be independently binding and enforceable by and upon the parties thereto, in accordance with its terms.

IN WITNESS WHEREOF, the parties hereto have executed this agreement by their respective duly authorized representatives this 26th day of February, 1974.

TRANSIT AUTHORITY OF LOUISVILLE
AND JEFFERSON COUNTY

By: /s/ Charles W. Mann
LOCAL DIVISION 1447
AMALGAMATED TRANSIT UNION AFL-CIO

By: /s/ Ernest F. Judd

EXHIBIT "A"

The employee protective arrangements for the Project to which this Exhibit "A" applies shall include the following rights, privileges, and benefits to the extent applicable to any covered employee:

(1)(a) Whenever an employee retained in service is placed in a worse position with respect to compensation as a result of the Project, he shall be considered a "displaced employee" and shall be paid a monthly "displacement allowance", to be determined in accordance with this paragraph. Said displacement allowance shall be paid during the protective period following the date on which the employee is first displaced, so long as the employee is unable, in the normal exercise of his seniority rights, to obtain a position producing compensation equal to or exceeding the compensation of the position from which he was displaced.

(b) The displacement allowance shall be a monthly allowance determined by computing the total compensation received by the employee and his total time paid for during the last twelve (12) months in which he performed service immediately preceding the date of his displacement as a result of the Project, and by dividing separately the total compensation and the total time paid for by 12, thereby producing the average monthly compensation and the average monthly time paid for. Such allowance shall be further adjusted to reflect any subsequent wage adjustments increasing employee compensation. If the displaced employee's compensation in his current position is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent wage adjustments), he shall be paid the difference, less compensation for any time lost on account of voluntary absences to the extent that he is not available for service equivalent to his average monthly time, but he shall be compensated in addition thereto at the rate of the current position for any time worked in excess of the average monthly time paid for. It is not intended that the provisions of this paragraph shall affect in any way the retirement on pension or annuity rights and privileges of any employee. If a displaced employee fails to exercise his seniority rights to secure another position available to him, which does not require a change in his place of residence as hereinafter defined, to which he is entitled under the working agreement and which carries a wage rate and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated, for the purposes of this paragraph, as occupying the position he elects to decline.

(2)(a) Whenever any employee is laid off or otherwise deprived of employment as a result of the Project, he shall be considered a "dismissed employee," and shall be paid a monthly dismissal allowance to be determined in accordance with this paragraph. This dismissal allowance shall be first paid each dismissed employee on the 30th day following the day on which he is "dismissed", and continue payable monthly for the following periods of time:

Employee's length of service prior to adverse effect	Period of payment
1 day to 6 years	equivalent period
6 years or more	6 years

During the 6-year period following the date on which the employee is deprived of employment, the monthly dismissal allowance shall be equivalent to 1/12 of the compensation received by him in the last twelve (12) months of his employment in which he earned compensation (adjusted to reflect subsequent wage adjustments increasing compensation) prior to the date on which he was first deprived of employment as a result of the project.

(b) An employee shall be regarded as deprived of employment and entitled to a dismissal allowance when the position he holds is abolished as a result of the Project and he is unable to obtain by the exercise of his seniority rights another position; or, when the position he holds is not abolished but he loses that position as a result of the exercise of seniority rights by an employee whose position is abolished as a result of the Project; or, as a result of the exercise of seniority rights by other employees brought about as a result of the Project. Any such deprivation of employment which occurs as a result of an agreement reached or arbitration award rendered in accordance with these employee protective arrangements which require a selection from, or reassignment of, the working forces, shall not be deemed to be any less a result of the Project by reason of such agreement or award. In the absence of proper notice of an intended change, and an agreement or arbitration award specifying arrangements for the selection from, or reassignment of, the working forces, as required by the protective conditions applicable to the Project, no employee who has been deprived of employment as a result of the Project shall be required to exercise his seniority rights to secure another position in order to qualify for a dismissal allowance hereunder.

(c) Each employee receiving a dismissal allowance shall keep the Public Body informed as to his current address and the current name and address of any other person by whom he may be regularly employed.

(d) The dismissal allowance shall be paid to the regularly assigned incumbent of the position abolished. If the position of an employee is abolished when he is absent from service, he will be entitled to the dismissal allowance when he is available for service. The employee temporarily filling said position at the time it was abolished will be given a dismissal allowance on the basis of that position until the regular employee is available for service, and thereafter shall revert to his previous status and will be given the protections of this agreement in said position, if any are due him.

(e) An employee receiving a dismissal allowance shall be subject to call to return to service by his former employer after being notified in accordance with the terms of the working agreement, and such employee may be required to return to service of his former employer for other reasonably comparable employment for which he is physically and mentally qualified and which does not require a change in his place of residence, as hereinafter defined, if his return does not infringe upon the employment rights of other employees under the working agreement.

(f) When an employee who is receiving a dismissal allowance returns to service, said allowance shall cease while he is so reemployed and the period of time during which he is so reemployed shall be deducted from the total period for which he is entitled to receive a dismissal allowance. During the time of such reemployment, he shall be entitled to all other applicable provisions of this agreement.

(g) The dismissal allowance of any employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings from such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. Such employee, or his Union representatives, and his former employer, shall agree upon a procedure by which the Public Body shall be currently informed of the wages earned by such employee in employment other than with his former employer, and the benefits received.

(h) The dismissal allowance shall cease prior to its normal expiration date, as described in paragraph (2)(a) above, in the event of the failure of the employee without good cause to return to service in accordance with the working agreement by the exercise of his seniority rights to secure an available position in his former classification, or for other reasonably comparable employment for which he is physically and mentally qualified and which does not require a change in his place of residence, as hereinafter defined, or in the event of his resignation, death, retirement, or dismissal for cause in accordance with the working agreement.

(3) In determining length of service of a displaced or dismissed employee for purposes of this agreement, such employee shall be given full service credits in accordance with the records and labor agreements applicable to him and he shall be given additional service credits for each month in which he receives a dismissal or displacement allowance as if he were continuing to perform services in his former position.

(4) No employee receiving a dismissal or displacement allowance shall be deprived, during his protected period, of any rights, privileges, or benefits attaching to his employment, including without limitation group life insurance, hospitalization, and medical care, free transportation for himself and his family, sick leave, continued status and participation under any disability or retirement program, and such other employee benefits as Social Security, Workmen's Compensation and unemployment compensation, as well as any other benefits to which he may be entitled under the same conditions and so long as such benefits continue to be accorded to other employees of the bargaining unit, in active service or furloughed as the case may be.

(5) No employee shall be entitled to an allowance under paragraphs (1) or (2) hereof because of the abolishment of a position to which, at some future time, he could have bid, been transferred, or promoted.

(6)(a) Any dismissed or displaced employee, who is retained in service or who is later restored to service after being entitled to receive a dismissal or displacement allowance, and who is required to change the point of his employment as hereinafter defined, in order to retain or secure active employment with his employer and is thereby required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects, for the travelling expense for himself and his immediate family, and for his own actual wage loss during the time necessary for such transfer, and for a reasonable time thereafter (not to exceed five (5) working days) used in securing a place of residence in his new location. The exact extent of the responsibility of the Public Body under this paragraph, and the ways and means of transportation shall be agreed upon in advance between the Public Body and the employees affected, or their Union representatives. Claims under this paragraph must be submitted to the Public Body within ninety (90) days after they are incurred.

(b) If any such employee is furloughed within three (3) years after changing his point of employment in accordance with paragraph (a) hereof, and elects to move his place of residence back to his original point of employment, the Public Body shall assume the expense of moving his household and other personal effects under the provisions of paragraph (a) hereof.

(c) Except as otherwise provided in this paragraph, changes in place of residence, subsequent to the initial changes caused by the action taken pursuant to the Project, which do not result from said action but grow out of the normal exercise of seniority, shall not be considered within the purview of the provisions of this paragraph.

(7)(a) The following conditions shall apply to the extent they are applicable in each instance to any employee who is retained in the service of the Public Body (or who is later restored to service after being entitled to receive a dismissal allowance) and who is required to change the point of his employment, by a distance of twenty (20) straight line miles in order to retain or secure active employment with his employer, within his protective period as a result of the Project, and is, thereby, required to move his place of residence; provided, however, that these conditions shall not apply where the change of the point at which the employee is employed results in bringing that point nearer his place of residence.

If the employee owns his own home in the locality from which he is required to move, he shall, at his option, be reimbursed by the Public Body for any loss suffered in the sale of his home for less than its fair market value, such loss to be paid within thirty (30) days of the sale of the home. In each case, the fair market value of the home in question shall be determined, as of a date sufficiently prior to the date of the transaction of sale, so as to be unaffected thereby. The Public Body shall, in each instance, be afforded an opportunity to purchase the home at such fair market value before it is sold by the employee to any other person. It is the intent of this paragraph that the fair market value so determined and to be received by the employee, is not to be reduced by any expenses incident to the closing of the transaction of sale of home, such as loan discount, loan closing costs, preparation of abstract, or deed of sale, and the employee will be made whole for any such expense involved.

If the employee is under a contract to purchase his home, the Public Body shall protect him against loss under such contract and, in addition, shall relieve him from any further obligation thereunder.

If the employee holds an unexpired lease of a dwelling occupied by him as his home, the Public Body shall protect him from all loss and cost in securing the cancellation of said lease.

(b) Changes in place of residence which are made subsequent to the initial changes caused by the Project, and which grow out of the normal exercise of seniority rights, shall not be considered within the purview of this paragraph.

(c) No claim for loss shall be paid under the provisions of the paragraph unless such claim is presented to the Public Body within one (1) year after the date the employee is required to move.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of a lease, or any other question in connection with these matters, it shall be decided through joint conference between the employee, or his Union representative, and the Public Body. In the event they are unable to agree, the dispute or controversy may be referred by the Public Body or the Union to a board of competent real estate appraisers, selected in the following manner: one to be selected by the representatives of the employee, and one by the Public Body, and these two, if unable to agree within thirty (30) days upon a valuation, shall endeavor by agreement within ten (10) days thereafter to select a third appraiser, or to agree to a method by which a third appraiser shall be selected, and failing such agreement, either party may request the State or local real estate board or commission, or comparable body, to designate within ten (10) days a third appraiser whose designation will be binding upon the parties. A decision of a majority of the appraisers shall be required and said decision shall be final and binding. The salary and expenses of the neutral appraiser, including expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

(8) A dismissed employee entitled to protection under this Exhibit "A" may, at his option within twenty-one (21) days of his dismissal, resign and (in lieu of all other benefits and protections provided in this agreement) accept a lump sum payment computed in accordance with section (9) of the Washington Job Protection Agreement of May 1936.

(9) Whenever used herein, unless the context requires otherwise, the term "protective period" means that period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of six (6) years therefrom, provided, however, that the protective period for any particular employee during which he is entitled to receive the benefits of these provisions, shall not continue for a longer period following the date he was displaced or dismissed than the employee's length of service as shown by the records and labor agreements applicable to his employment prior to the date of his displacement or his dismissal.

(10) If any employer of the employees covered by this Exhibit "A" shall have rearranged or adjusted its forces in anticipation of the Project, with the effect of depriving an employee of benefits to which he should be entitled under this Exhibit as an employee affected by the Project, the provisions of this agreement shall apply to such employee as of the date when he was so affected.

CONSTITUTION OF KENTUCKY

§ 250. Arbitration, method for to be provided.—It shall be the duty of the General Assembly to enact such laws as shall be necessary and proper to decide differences by arbitrators, the arbitrators to be appointed by the parties who may choose that summary mode of adjustment.

Cross-References. Arbitration and award, KRS ch. 417.

KENTUCKY REVISED STATUTES

KRS 417.010 Submission of controversy to arbitration by agreement.

Any controversy that might be the subject of an action may be submitted, by written agreement of the parties to the controversy, to one or more arbitrators for decision, or to two arbitrators with provision for an umpire to be selected by the two arbitrators if they disagree. The agreement of submission shall be binding on the parties thereto if it states the matter submitted and who are to be the arbitrators.
History: KS 69.

* * * * * * *

KRS 96A.070. Board officers, executive committee, director, employes.—(1) The board shall, within sixty (60) days after the appointment of its entire initial membership, and thereafter in July of each year, elect from its members a chairman and a vice chairman. It may, in its discretion, employ an executive director and a secretary-treasurer, neither of whom shall be a member of the board; Provided, however, if the creation and establishment of the authority is shown by the provisions of the proceedings or joint proceedings to have been undertaken only on a stand-by basis, the board may defer the employment of an executive director and may, on an interim basis, designate a secretary-treasurer from its own membership.

(2) The board may, in its discretion, employ necessary legal counsel and other agents and employes to carry out its work and functions, and may from time to time prescribe and alter such rules and regulations as it may deem necessary.

(3) The executive director, if and when employed in the discretion of the board, shall be experienced and knowledgeable in the field of transportation; and if and when employed, such executive director shall be the chief executive officer of the authority, having such powers and duties as the board may prescribe. Such executive director may recommend the establishment or alteration of rules and regulations, and of rates and charges for use of the services and facilities of the mass transportation system of the authority; but action in such respects, and in the issuance of revenue bonds or mortgage bonds of the authority, and in requesting the issuance of general obligation bonds by other public bodies for the benefit of the authority, and in authorizing leases of the properties of the authority for financing purposes, shall be taken by the board, or by the executive committee of the board if properly thereunto authorized.

(4) The secretary-treasurer shall keep the minutes of all meetings of the board, and shall also keep a set of books showing the receipts and expenditures of the board. He shall preserve on file duplicate vouchers for all expenditures and shall present to the board, upon request, complete reports of all financial transactions and the financial condition of the board. Such books and vouchers shall at all times be subject to examination by the governing body of any public body by which the authority was created or enlarged. He shall transmit at least once annually a de-

tailed report of all acts and doings of the board to the public body or bodies by whom the board was created. He shall cause all moneys of the authority coming into his hands to be deposited in one or more financial institutions, as designated from time to time by the board.

(5) The board shall require its secretary-treasurer, and its executive director, if and when such executive director shall be employed, each to execute bond in favor of the authority, in such respective penal sums as the board may fix, in favor of the authority, and conditioned upon faithful performance of the duties of such offices and full accounting to the authority. Each such bond shall be with corporate surety, provided by a corporate surety company qualified to transact business in Kentucky and approved, in each instance, by the board. The board may in like manner require similar bonds, with corporate surety, to be given by other officers, agents and employes in such manner and in such penal sums, as it may specify from time to time. Premiums payable to sureties upon such bonds shall be paid by the authority and may be chargeable as an operating expense of the authority.

(6) The board shall fix the salaries, wages or other compensation of the officers, agents and employes whom it may engage from time to time; in each case within such limitations, if any, as may be prescribed in the proceedings or joint proceedings set forth in the establishment of the authority, or as such proceedings may be amended; but such salaries, wages or other compensation shall constitute obligation of the authority only, and shall be payable from the authority's revenues and any other available resources, and shall not constitute obligations of any city or county participating in the creation and establishment, or subsequent enlargement, of the authority.

(7) The board may, by resolution duly adopted and spread at large upon its public records, establish an execu-

tive committee, composed of such members of the board as may be specified in such resolution, and may authorize such executive committee to exercise in intervals between board meetings any powers of the board except those powers which are expressly required by this chapter or by other controlling provisions of law to be exercised by the board.

(8) The board may create such other committees of its members as it may deem necessary or proper; but the same shall be advisory in nature and shall report to the board or to the executive committee, and shall not be authorized to take any independent action except in such advisory capacity. (Enact. Acts 1970, ch. 243, § 8.)

* * * * * * *

KRS 96A.090. Authority's capacity to accept appropriations, grants.—(1) No transit authority established or created under and pursuant to this chapter shall be vested with any power to levy taxes of any nature or in any amount.

(2) The governing body of any public body participating in the creation and establishment of an authority, or in the subsequent enlargement thereof, may, in the proceedings or joint proceedings, or by subsequent action, appropriate and pay over to an authority from its general funds or from other resources not required by law to be appropriated for other purposes, any sum or sums of money, or any property which such public body shall determine to be necessary or advisable in furtherance of the public purposes of the authority as set forth in this chapter. An authority may receive moneys or property from any such source, and may use the same in furtherance of its proper purposes; but an authority shall not pledge anticipated appropriations from any such source for any period beyond the period for which any such appropriations shall be made,

except to the extent of committing that any such appropriation, when and if actually received by the authority, without commitment as to the possible amount thereof, will be applied by the authority in certain specified ways.

(3) An authority may accept gifts, grants, or loans of money or other property from the United States, the state or any person or entity for such purposes, may enter into any agreement required in connection therewith, may comply with any federal or state laws or regulations applicable thereto, and may hold, use, and dispose of such money or property in accordance with the terms of the gift, grant, loan, or agreement relating thereto. (Enact. Acts 1970, ch. 243, § 10.)

* * * * * * *

KRS 96A.200. Duties to employes transferred from acquired system.—If an authority acquires an existing transit system, the authority shall assume and observe all existing labor contracts and pension obligations. All employes of such system who are necessary for the operation thereof by the authority shall be transferred to and appointed as employes of the authority. Such employes shall be given seniority credit and sick leave, vacation, insurance, and pension credits in accordance with the records or labor agreements from the acquired transit system. The authority shall assume the obligations of any transit system acquired by it with regard to wages, salaries, hours, working conditions, sick leave, health and welfare and pension or retirement provisions for employes. The authority and the employes, through their representatives for collective bargaining purposes, shall take whatever action may be necessary to have pension trust funds presently under the joint control of the acquired transportation system and the participating employes through their representatives transferred to the trust fund to be established, maintained and administered jointly by the authority and the participating employes through their representatives. No employe of any acquired transportation system who is transferred to a position with the authority shall by reason of such transfer be placed in any worse position with respect to workmen's compensation, pension, seniority, wages, sick leave, vacation, health and welfare insurance or any other benefits than he enjoyed as an employe of such acquired transportation system. (Enact. Acts 1970, ch. 243, § 20.)

* * * * * * *

KRS 96A.360. Annual budget and report of transit authority required.—Not less than annually any transit authority for the benefit of which a mass transportation program has been approved by the electorate of any public body, or by the electorate of its transit area in the event all public bodies comprising the membership of such transit authority have submitted such mass transportation program to the electorate of such transit area as provided by KRS 96A.310 to 96A.370, shall file with such public body or public bodies an annual budget of current expenses and an annual report, together with such other periodic reports and data as such public bodies may reasonably require and prescribe. Such annual budget may be approved or disapproved by such public body or public bodies, or may be caused by such public body or public bodies to be revised, amended, or otherwise altered in the sound discretion of such public body or public bodies. Provided, however, That no disbursement of any funds within any mass transit trust fund shall be made until such annual budget shall in its final form be approved by the governing bodies of all such public bodies. (Enact. Acts 1974, ch. 169, § 6, effective March 27, 1974.)

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UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

LOCAL DIVISION 589, AMALGAMATED TRANSIT
UNION, AFL-CIO, CLC, - - *Plaintiff, Appellant,*

v. **No. 81-1180**

THE COMMONWEALTH OF MASSACHUSETTS,
ET AL., - - - - *Defendants, Appellees.*

LOCAL DIVISION 589, AMALGAMATED TRANSIT
UNION, AFL-CIO, ET AL., - *Plaintiffs, Appellees,*

v. **No. 81-1198**

THE COMMONWEALTH OF MASSACHUSETTS,
ET AL., - - - - *Defendants, Appellants.*

LOCAL DIVISION 589, AMALGAMATED TRANSIT
UNION, AFL-CIO, - - - *Plaintiff, Appellee,*

v. **No. 81-1219**

THE COMMONWEALTH OF MASSACHUSETTS,
Defendant, Appellee,
MASSACHUSETTS BAY TRANSPORTATION AUTHORITY, - - - - *Defendant, Appellant.*

JUDGMENT—Entered September 30, 1981

This cause came on to be heard on appeals from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: Accordingly, to the extent that it is inconsistent with the opinion filed this day, the district court's order of March 17, 1981, as clarified on May 15, 1981, is vacated and the case is remanded for further proceeding consistent with the opinion filed this day.

No costs.

By the Court:

Clerk.

cc: Ms. Hirshman and Messrs. Golann, Elcock and Riley.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

LOCAL DIVISION 589, AMALGAMATED TRANSIT
UNION, AFL-CIO, CLC, - - *Plaintiff, Appellant,*

v. **No. 81-1180**

THE COMMONWEALTH OF MASSACHUSETTS,
ET AL., - - - - *Defendants, Appellees.*

LOCAL DIVISION 589, AMALGAMATED TRANSIT
UNION, AFL-CIO, ET AL., - *Plaintiffs, Appellees,*

v. **No. 81-1198**

THE COMMONWEALTH OF MASSACHUSETTS,
ET AL., - - - - *Defendants, Appellants.*

LOCAL DIVISION 589, AMALGAMATED TRANSIT
UNION, AFL-CIO, - - - *Plaintiff, Appellee,*

v. **No. 81-1219**

THE COMMONWEALTH OF MASSACHUSETTS,
Defendant, Appellee,
MASSACHUSETTS BAY TRANSPORTATION AUTHORITY, - - - - *Defendant, Appellant.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Walter Jay Skinner, *U. S. District Judge*]
[511 F. Supp. 312 (D. Mass. 1981)]

OPINION—Filed September 30, 1981

Before: Campbell, Bownes and Breyer, *Circuit Judges.*

Linda R. Hirshman, with whom *Jacobs, Burns, Sugarman & Orlove, Earle Putnam*, General Counsel, *Douglas Taylor*, and *Gromfine, Sternstein, Rosen and Taylor, P.C.* were on brief, for Local Division 589, Amalgamated Transit Union.

Dwight Golann, Assistant Attorney General, with whom *Francis X. Bellotti*, Attorney General, *Mitchell S. Sikora, Jr., Bruce Mohl, Stephen M. Limon*, Assistant Attorneys General, and *Max Beck* were on brief, for The Commonwealth of Massachusetts, et al.

Joseph Elcock, General Counsel, with whom *Ronald G. Busconi*, Assistant General Counsel, was on brief for the Massachusetts Bay Transportation Authority.

William J. Riley, and *Flamm, Kaplan, Paven & Feinberg* on brief for the Boston Lodge 264, District 38, International Association of Machinists and Aerospace Workers.

Breyer, *Circuit Judge.* This case raises two difficult and important sets of questions concerning collective bargaining and rapid transit. First, can the Commonwealth of Massachusetts enact statutes that are inconsistent with assurances that its Transit Authority previously gave the Secretary of Labor as part of an application for federal grant money? Second, do those Massachusetts statutes unconstitutionally impair pre-existing collective bargaining contracts? We find that insofar as federal law is concerned, the state statutes are valid.

I

A

Since 1912 appellant, Local 589 of the Amalgamated Transit Union (the "Transit Union") has represented most Boston transit system employees. Before 1947, it negotiated contracts with the system's private owners (Boston Elevated Railway). Since 1947, it has negotiated with the system's public owner, which is now the Massachusetts Bay Transportation Authority (MBTA).[1] The MBTA is a public agency with power to enter into binding agreements on behalf of the Commonwealth.[2]

On January 1, 1973, the Transit Union and the MBTA entered into a detailed agreement setting forth wages, hours and working conditions. We shall refer to that agreement as the Basic Agreement. Its most important provisions for present purposes are those governing the procedure for changing its terms.

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[1] In 1947, Boston Elevated Railway was purchased by a public entity, the Metropolitan Transportation Authority (MTA). As a result of the takeover, MTA workers became public employees; Section 19 of the enabling act, Chapter 544 of the Acts of 1947, authorized the MTA to bargain collectively and to submit contract disputes to binding interest arbitration.

[2] In 1964, Congress enacted the Urban Mass Transportation Act, 49 U.S.C. §§ 1601-1613. Under that statute, federal money flows only to state and local public bodies and agencies. 49 U.S.C. § 1602(a)(1). In order to take advantage of the available federal funds, the Massachusetts legislature converted the MTA to the MBTA in 1964. Mass. Gen. Laws Ann. ch. 161A. Pursuant to state law, "[t]he authority is authorized and directed from time to time to take all necessary action to secure any federal assistance which is or may become available . . . for any of the purposes of this chapter. . . ." Mass. Gen. Laws Ann. ch. 161A, § 29 (cum. supp. 1981). The MBTA is also authorized "to bargain collectively with labor organizations representing employees of the authority and to enter into agreements . . . with such organizations. . . ." Mass. Gen. Laws Ann. ch. 161A, § 19 (cum. supp. 1981).

As read literally, the Basic Agreement provides that its terms will remain in effect forever unless (1) *both* parties agree to a change *or* (2) an arbitration panel changes the Agreement's terms. The Agreement invokes a type of arbitration called "interest arbitration." Unlike "grievance arbitration," which involves the interpretation and application of existing contractual provisions, "interest arbitration" involves the creation of new substantive contractual terms, which will govern the parties' future relations.[8] To be more specific, the 1973 Basic Agreement provides:

> a) The Basic Agreement and its provisions shall continue in force until December 31, 1975 "and from year to year thereafter unless changed by the Parties" after appropriate notice. (§ 600)
>
> b) After appropriate notice the contract will "be opened up and the change or changes desired shall then be considered . . . ." "Upon failure to reach a mutual agreement upon any of the changes desired . . . the same shall be arbitrated as provided for in this Agreement and the Award shall then be entered into and become a part of this Agreement." (§ 601)
>
> c) Arbitration is to be conducted by a "Board of Arbitration selected in a manner provided in Section 103." (§ 100)
>
> d) The Board of Arbitration shall consist of three members, one selected by the Transit Union, one by the MBTA, and the third chosen from a list of five provided by the American Arbitration Association

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[8] For a discussion of interest arbitration, see F. Elkouri & E. Elkouri, How Arbitration Works, 47-48, 50-57 (3rd ed. 1973).

(through a process of successive striking) of "persons experienced in transportation." (§ 103)

As provided in these sections, the Basic Agreement was "opened up" at the end of 1975. The parties could not agree about the changes they had separately proposed, and they proceeded to arbitration. In 1976, the arbitration panel entered an award changing the Basic Agreement in various ways. But the arbitrators did not change the Agreement's procedure for making changes. And, they stated that "all provisions of the Agreement which are not modified by this Award shall continue in effect." They ruled that the Basic Agreement, as modified, would extend through December 31, 1977.

At the beginning of 1978, the Basic Agreement was again "opened up." Again the parties could not agree about the changes they had separately proposed. This time, however, they did not proceed to arbitration. In May, the Transit Union sought arbitration—and the MBTA began to prepare for arbitration. But in July, the Massachusetts legislature enacted a statute, Chapter 405 of the General Laws. This statute, designed to hold down rapidly rising transit costs, mandated an arbitration procedure somewhat different from that contained in the Basic Agreement. The Transit Union immediately claimed that Chapter 405 was itself inconsistent with the Basic Agreement; and it insisted upon Basic Agreement-type arbitration. The MBTA believed that Chapter 405 was lawful, and it insisted upon Chapter 405-type arbitration.

The impasse was resolved on August 8, 1979 when the parties entered into a "Memorandum of Understanding." The Memorandum began by stating "that the Articles of Agreement entered into as of January 1, 1973, as amended, shall be further amended as follows." The Memorandum went on to make a host of changes in the Basic Agreement, but it did not change the "interest arbitration" provisions in any relevant respect.[4] The Memorandum extended the Basic Agreement as modified by stating "The express term of the Articles of Agreement shall be January 1, 1978, to and including December 31, 1980." In signing the Memorandum, however, the MBTA wrote, "Approved as to form to the extent not inconsistent with Chapter 405 of the Acts of 1978."

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[4] The Memorandum did change sections 600 and 601 (Basic Agreement provisions governing the procedure for changing the Basic Agreement). These changes, however, dealt only with the *notification* provisions, not the *arbitration* provisions. The Memorandum provides in relevant part:

> 4. *Changes in Agreement*
>
> Sections 600 and 601 shall be amended to read as follows:
>
> This Agreement and the provisions hereof shall continue in force and be binding upon the respective parties hereto until and including the thirty-first day of December, 1980, and from year to year thereafter unless changed by the parties. Either of the parties desiring a change in any section or sections of this Agreement shall notify the other party, in writing, that it desires a change at least one hundred and eighty (180) days prior to the thirty-first day of December, 1980, and thereafter, at least one hundred and eighty (180) days prior to the end of each year, which is the thirty-first day of December. Such notification shall include, in writing, all the specific changes desired of either party.
>
> Within ten (10) days of the receipt of notification of desired changes, representatives of the parties shall commence negotiations in an effort to reach a mutual agreement upon the changes desired by the parties.
>
> Upon failure to reach an agreement on all the changes desired by the parties ninety (90) days prior to the expiration of the Agreement, the parties shall submit the disputed issues to final and binding arbitration as provided for in this Agreement, and they shall forthwith take such steps as will assure that the arbitrator will be selected within sixty (60) days prior to the expiration of the Agreement. Nothing herein shall preclude the parties from continuing to negotiate in an effort to resolve their differences during the period, while the procedures for the establishment of arbitration are in process.

At the end of 1980, the Basic Agreement[5] was once again opened up and the parties sought changes. At this point, the legislature, concerned about a possible transit shutdown due to lack of funds, enacted another statute, Chapter 581 of the General Laws. That statute also sought to hold down costs by imposing additional conditions upon the arbitration (and collective bargaining) procedures. The parties immediately reiterated the positions they had taken in 1978. The Transit Union claimed that both Chapters 405 and 581 were illegal and that arbitration must take place in accordance with the Basic Agreement's specified procedure. The MBTA refused to arbitrate except in conformity with Chapters 405 and 581.

The major differences between the two sets of procedures are the following: the Basic Agreement procedure, as previously mentioned, involves three arbitrators. The Transit Union and the MBTA each select one arbitrator. The third, selected by the other two, is to be a person experienced in transportation matters. The arbitration standards used, while unspecified in the Basic Agreement, are presumably those traditionally used in local transit interest arbitration.[6]

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[5] Henceforth, unless the context clearly calls for a different reading, references to the "Basic Agreement" should be read to mean the "Basic Agreement (as amended)".

By contrast, the 1978 Chapter 405 procedure requires (1) that mediation precede arbitration,[7] (2) that a single arbitrator who is a resident of Massachusetts and "experienced in state and local finance," conduct the arbitration,[8] (3) that the arbitrator "rely primarily" on nine statutory factors, including "the financial ability of the authority to meet additional costs," and wages, hours and working conditions of comparable Massachusetts employees,[9] (4) that the arbitrator issue a written opinion analyz-

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[6] "The standards used by [interests] arbitrators are not pulled out of the air—nor are they artificially created. They are, generally speaking, the very same ones that are used by the parties in their negotiations. . . .

> Without question the most extensively used standard in 'interests' arbitration is prevailing practice. . . ."

F. Elkouri & E. Elkouri, *supra* note 3, at 745, 746, 747.

Both the "national comparable cities" standard and area comparisons have been used in the local transit industry. *Id.* at 751 n. 20.

[7] Codified at Mass. Gen. Laws Ann. ch. 161A, § 19D (cum. supp. 1981).

[8] Codified at Mass. Gen. Laws Ann. ch. 161A, § 19E (cum. supp. 1981).

[9] Mass. Gen. Laws Ann. ch. 161A, § 19F (1976), provided:

> The arbitrator shall rely primarily on the following factors in determining the basis for an award:
>
> 1. The financial ability of the authority to meet additional costs, which shall include but not be limited to:
>
> a. the statutory requirement of advisory board approval of the authority's fiscal budget;
>
> b. the financial ability of the individual communities and the commonwealth to meet additional costs;

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ing the application of the statutory factors,[10] and (5) that

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c. the average per capita tax burden, average annual income and sources of revenue within the commonwealth, and the effect of any arbitration award on the respective property tax rates of the cities and towns within the authority's district.

2. The overall compensation presently received by the employees, having regard not only for wages for time actually worked but also for wages for time not worked, including vacations, holidays and other excused time.

3. All benefits received by the employees, including insurance, pension, as well as the continuity and stability of employment.

4. The hazards of employment, physical, educational and mental qualifications, job training and skills involved.

5. A comparison of wages, hours, and conditions of employment of the employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees performing similar services within the commonwealth and with other employees generally in public and private employment within the commonwealth.

6. The average consumer price for goods and services, commonly known as the cost of living.

7. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

8. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between parties, in the public service of the commonwealth.

9. The stipulation of the parties.

Paragraph 8 was subsequently amended in 1981 by ch. 581. *See* note 14, *infra.*

[10] Codified at Mass. Gen. Laws Ann. ch. 161A, § 19G (cum. supp. 1981).

the arbitrator disallow any provision for cost of living adjustments after the expiration of a contract period.[11] Chapter 581,[12] enacted at the end of 1980, forbids the MBTA to bargain collectively or agree with the Transit Union about "inherent management rights." These rights are defined to include the right to hire, promote, assign, direct and discharge employees,[13] to direct and control programs and departments, to determine staffing levels, to assign overtime, to hire part-time employees, and to decide how to procure goods and services. Chapter 581 also forbids the MBTA to agree to pay pensions that are based upon overtime pay or to provide for automatic cost-of-living adjustments. It removed all of these matters from arbitration.[14]

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[11] Mass. Gen. Laws Ann. ch. 161A, § 19G (cum. supp. 1981) provides in relevant part:

> The scope of arbitration shall be limited to wages, hours, and conditions of employment and shall not include any provisions for any cost of living adjustments which are based on changes in the Consumer Price Index after the expiration of the contract period covered by the award. In addition, any wage or salary adjustments shall be expressed in per cent or dollar amounts, and in no case shall there be any provisions for salary adjustments to occur after the expiration of the contract period covered by the award.

[12] Codified at Mass. Gen. Laws Ann. ch. 161A, § 19 (cum. supp. 1981). *See* note 14, *infra*.

[13] The MBTA states in its brief on appeal that its employees may be discharged "for cause" and notes that § 102 of the 1973 Basic Agreement provides that "[t]he Authority will exercise the exclusive right to . . . discharge its employees for cause."

[14] As codified at Mass. Gen. Laws Ann. ch. 161A, § 19 (cum. supp. 1981), ch. 581 provides:

> The directors shall have authority to bargain collectively with labor organizations representing employees of the au-

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B

The Transit Union bases its claim that Chapters 405 and 581 are unlawful on two separate constitutional grounds. It makes a conceptually simple "Contract Clause" argu-

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thority and to enter into agreements, with such organizations relative to wages, salaries, hours, working conditions, health benefits, pensions and retirement allowances of such employees; provided, however, that the directors shall have no authority to bargain collectively and shall have no authority to enter into collective bargaining agreements with respect to matters of inherent management right which shall include the right:

(*i*) to direct, appoint, employ, assign and promote officers, agents and employees, and to determine the standards therefor.

(*ii*) (A) to discharge and terminate employees subject to the provisions of such clauses (B) and (C).

(B) No action set forth in (A) shall be sustained if, in a proceeding invoked in accordance with the provisions of such clause (C), the employee shall establish by a preponderance of the evidence that it was based upon race, color, religion, sex, age, national origin, handicapping condition, marital status, or political affiliation or activities or union activities or union organizing of the employees; a reprisal against the employee for disclosure of information by an employee which the employee reasonably believes evidences a violation of any law, rule or regulation or mismanagement, a gross waste of funds, or abuse of authority; a reprisal against any employee for the refusal of any person to engage in political activity.

(C) The parties may include in any written agreement a grievance procedure culminating in final and binding arbitration which may be invoked in the event any employee of the authority is aggrieved by any action taken under such clause (A).

(*iii*) to plan and determine the levels of service provided by the authority.

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ment. It claims that the Basic Agreement constitutes a contract with the Commonwealth of Massachusetts. Chap-

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(*iv*) to direct, supervise, control, and evaluate the departments, units, and programs of the authority, to classify the various positions of the authority and ascribe duties and standards of productivity therefor.

(*v*) to develop and determine levels of staffing and training.

(*vi*) to determine whether goods or services should be made, leased, contracted for, or purchased on either a temporary or permanent basis.

(*vii*) to assign and apportion overtime.

(*viii*) to hire part-time employees.

The authority is hereby prohibited from bargaining collectively or entering into any agreement to make pension benefit payments to its employees that are determined in a manner that includes the amount of overtime earnings of said employees.

The authority is hereby prohibited from bargaining collectively or entering into a contract which provides for automatic cost-of-living salary adjustments which are based on changes in the Consumer Price Index or other similar adjustments unless specifically authorized by law. Except as provided in sections nineteen C to nineteen G, inclusive, the employees of the authority shall submit all grievances and disputes pursuant to arbitration provisions in agreement existing at the time of the creation of the authority or subsequently entered into with the authority or, in the absence of such provisions, to the state board of concilliation and arbitration, or other board or body having similar powers and duties. The provisions of general or special laws relative to rates of wages, hours of employment and working conditions of public employees, shall not apply to the authority nor to the employees thereof, but the authority and its employees shall be governed with respect to hours of employment, rates of wages, salaries, hours, working conditions, health benefits,

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ters 405 and 581, in its view, unconstitutionally impair the obligations of that contract.[15] The Union also claims that those chapters violate the Supremacy Clause of the Constitution.[16] It argues that they are inconsistent with assurances that Massachusetts gave the Secretary of Labor under the Urban Mass Transportation Act (UMTA), § 13(c), 49 U.S.C. § 1609(c), and that such assurances, given to a federal official, must prevail, as a constitutional matter, over state law to the contrary. A few additional facts about UMTA will help to clarify this argument.

UMTA provides states with federal money to buy and to improve transit equipment and to supplement the operating revenues of local mass transit systems. In 1964 when Congress enacted this law it included in § 13(c) a requirement that, as a condition of obtaining a grant, the Secre-

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> pensions and retirement allowances of its employees by the laws relating to street railway companies.

Chapter 581 also amended ch. 405, Mass. Gen. Laws. Ann. ch. 161A, § 19F (cum. supp. 1981), so that paragraph 8 of that section now provides that

> [t]he arbitrator shall rely . . . on . . . [s]uch other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, factfinding, arbitration or otherwise between parties, in the public service of the commonwealth, and which are not precluded from bargaining under section nineteen.

[15] U.S. Constit. art. I, § 10 provides in relevant part: "no state shall . . . pass any . . . law impairing the Obligation of the Contracts. . . ."

[16] U.S. Constit. art. VI, states in relevant part: "the Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land. . . ."

This provision [i.e. § 13(c)] is truly ancillary to the thrust of the transportation program. It is only included in the interest of fairness and equity. If as a result of the expenditure of Federal funds, a railroad employee having a lifetime of contributions to a pension system were to lose it because his railroad was taken over by the public, that would be grossly unfair. This provision protects those rights which have been hard earned and enables them to continue.

The legislative history has to be corrected, however, because if the bill shall be enacted, we must have a record that will show that the bill does not preempt State law; it does not control or dominate with irrevocable authority local situations. The bill provides for the encouragement of collective bargaining. That does

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and manage their affairs and their arrangements with their employees free from Federal interference and control.

I might say in this connection, Mr. President, that many States have laws which prevent bargaining with unions in the area of public employment. This section of the bill would preempt such laws and such ordinances as passed pertinent thereto by the local authorities.

* * *

If this language remains in the bill, I am afraid we shall again be preempting established State laws, city ordinances, county ordinances or laws, whichever pertain.

As I said a moment ago, if the local government wishes to extend the collective bargaining rights, wages, working conditions, and so forth, with no right to strike, that is up to the local government, be it city, county or State; but if the United States moved in with the language contained in subsection (c) of section 19, it would have the effect, I believe, of preempting State law in this area.

109 Cong. Rec. 5415.

tary of Labor certify that "fair and equitable arrangements" have been made "to protect the interests of employees affected" by the federal assistance. It adds that these protective arrangements "shall include . . . such provisions as may be necessary for . . . preserving rights, privileges and benefits . . . under existing collective bargaining agreements," continuing "collective bargaining rights . . . ," protecting "individual employees against a worsening of their positions with respect to their employment . . ." and so on.[17]

In applying this provision, the Department of Labor has encouraged transit authorities and unions to submit joint, agreed upon, assurances for review. These assurances are typically referred to as § 13(c) agreements. Over the years, the MBTA and the Transit Union have entered into a series of § 13(c) agreements. The most recent one, entered into on December 10, 1974, has been used repeatedly by the MBTA in grant applications, and by the Department of Labor for certification purposes.

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[17] Section 13(c) of UMTA, 49 U.S.C. § 1609 provides:

> (c) It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.

The 1974 § 13(c) agreement includes the following assurances, which are directly relevant here:

> a) "All rights, privileges (including pension rights and benefits) of employees . . . under the existing collective bargaining agreements or otherwise shall be preserved and continued unless changed . . . as provided in said collective bargaining agreements." (§ 3a)
>
> b) "The collective bargaining rights of employees . . . including the right to arbitrate labor disputes . . . , to the extent such are provided for by applicable laws and/or existing collective bargaining agreements, or otherwise shall be preserved and continued. . . ." (§ 4)
>
> c) "Any . . . labor dispute . . . shall be referred to arbitration in accordance with the arbitration procedures set forth in any then-applicable collective bargaining agreement. . . . The term 'labor dispute' . . . shall be broadly construed and shall include any controversy concerning wages, salaries, hours, working conditions or benefits, . . . the making or maintaining of collective bargaining agreements, the terms to be included in such agreements. . . ." (§ 13(c)(a)(1))[18]

Ever since the enactment of Chapter 405, the Transit Union has claimed that the procedure there set out is inconsistent with this set of assurances and that the assurances must prevail over state law to the contrary.

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[18] The 1974 § 13(c) agreement is set out in full in the appendix to the opinion of the district court below, 511 F. Supp. 312, 332-340 (D. Mass. 1981).

The MBTA not only has denied that these assurances prevail, as a matter of federal law, over inconsistent state law, but also has denied that these assurances are inconsistent with Chapters 405 and 581. In its view the assurances guarantee the union rights only to the extent that those rights are consistent with current state law; the assurances do not protect the union against *changes* in state law. At the urging of the Department of Labor, the parties submitted the question of the meaning of these assurances to an arbitrator. In 1979 that arbitrator, William Fallon, ruled that Chapter 405 "and the MBTA's insistence on arbitrating interest disputes pursuant to those amendments [i.e. Chapter 405] constitute a conflict with pre-existing § 13(c) agreements executed by the parties." He did not determine which should take precedence. The parties continue to dispute whether the § 13(c) assurances are inconsistent with Chapters 405 and 581, and if so, which prevail.[19]

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[19] We note that initially the MBTA apparently had power to enter into contracts for federal assistance which would impose regulations or practices in conflict with state law. Mass. Gen. Laws Ann. ch. 161A, § 29 (1976) (enacted in 1964) provided broad authority to waive state law in the face of such a conflict and stated in part:

> . . . It is the intent of this section that the provisions of any federal law, administrative regulation or practice governing federal assistance for the purposes of this chapter shall, to the extent necessary to enable the commonwealth or its subdivisions to receive such assistance and not constitutionally prohibited, override any inconsistent provisions of this chapter.

This broad waiver authority was amended and restricted in 1980 by ch. 581, Mass. Gen. Laws Ann. ch. 161A, § 29 (cum. supp. 1981). The language quoted above and other language

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C

The parties have brought three separate sets of legal proceedings designed to vindicate their legal positions. First, the MBTA challenged Arbitrator Fallon's award in state court. That proceeding is currently pending in the Supreme Judicial Court.[20] Second, the Transit Union brought a proceeeding in the Commonwealth Superior Court to require the MBTA to comply with the Basic Agreement's arbitration procedures despite conflicting state law. The Superior Court enjoined violation of various provisions of the Basic Agreement for six months, but it indicated that (at least for the purposes of injunctive

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providing authority to waive state law was repealed. Instead, the legislature provided:

> If the provisions of any federal law, administrative regulation, or practice governing federal assistance for the purposes of this chapter are inconsistent with any provisions of this chapter to the extent that the commonwealth or its political subdivisions are prohibited or potentially prohibited from receiving such assistance, the chairman of the authority shall, within thirty days after the federal government has notified him that an inconsistency may exist, notify the governor, and the clerks of the house and senate of such inconsistency.

[20] The suit in the Supreme Judicial Court of Massachusetts is a declaratory action pursuant to Mass. Gen. Laws Ann. ch. 231A, seeking a declaration that, *inter alia*, ch. 405 violated the § 13(c) agreement, that the arbitrator exceeded his powers in issuing the award, that the arbitrator's award constituted an unauthorized interpretation of state law, and that the award should be vacated.

The Transit Union removed the state action to federal court, 28 U.S.C. § 1441(b); however, it was remanded to the state court for lack of subject matter jurisdiction. *Adams* v. *Massachusetts Bay Transportation Authority,* 79-2059-S (D. Mass. December 24, 1980).

relief) the Basic Agreement may, as a matter of state law, have expired.[21] Finally, the Transit Union brought this action in federal district court, seeking a declaration that Chapters 405 and 581 are unconstitutional, and an injunction requiring the MBTA to arbitrate according to the terms of the Basic Agreement.

On March 17, 1981, the federal district court issued a preliminary injunction. 511 F. Supp. 312 (D. Mass. 1981). Focusing on "the central mutual consideration of the [1973 Basic] [A]greement and the core of the parties' reasonable expectations," 511 F. Supp. at 317, it held that *portions* of Chapters 405 and 581 violated the Contract Clause of the federal constitution. It found that the remainder of those chapters did not violate the § 13(c) agreement, for it interpreted that agreement as guaranteeing rights only insofar as they are consistent with current state law. It then ordered the parties to arbitrate under a procedure which the court itself created. The court modified the Basic Agreement to incorporate parts of Chapter 405 that it believed were constitutional.[22] The court issued a clarifying

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[21] In Superior Court the Transit Union sought to enforce those provisions of the Basic Agreement that rolled over under §§ 600 and 601 against ch. 581. The Superior Court action was brought not only by the Transit Union, but also by Lodge 264 of District 38 of the International Association of Machinists and Aerospace Workers and other unions who sought to enforce alleged rights under their respective contracts. *See Gallahue* v. *MBTA*, Mass. Superior Court, Suffolk County, No. 45917, slip op. at n. 1 (January 7, 1981). For purposes of injunctive relief, the Superior Court enjoined violation of various portions of Lodge 264's collective bargaining agreement until March 2, 1981.

[22] Essentially, the district court ruled that ch. 405 violates the Contract Clause only insofar as it imposed arbitration by a single arbitrator in place of tripartite arbitration. 511 F. Supp. at 317. The court directed that binding interest arbitration be conducted

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order on May 15, 1981.[23] Both sides have appealed this district court decision. The Transit Union claims that the Basic Agreement's provision must be enforced as written. The MBTA claims that Chapters 405 and 581 are constitutional and govern.

D

The basic legal issues before us on appeal, then, are two. First, do portions of Chapters 405 and 581 violate the Supremacy Clause? Do they conflict with the § 13(c) assurances, and, if so, do the § 13(c) assurances prevail? Second, do portions of Chapters 405 and 581 unconstitutionally "impair" the obligations of a prior contract? We must also consider a further and totally different issue arising out of a separate claim made by Lodge 264 of District 38 of the International Association of Machinists and Aero-

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in accordance with ch. 405, "except that three arbitrators shall be chosen as provided in the collective bargaining agreements and the third or neutral arbitrator shall be (1) experienced in transportation, (2) a legal resident of the Commonwealth of Massachusetts, and (3) experienced in state and local finances." 511 F. Supp. at 318.

With respect to Chapter 581, the district court stated that it violated the Contract Clause "[t]o the extent that . . . [it] . . . withdraws questions of substance from collective bargaining . . . ." 511 F. Supp. at 318. The court further held that "Chapter 581 is not applicable, because it conflicts with the essential provisions of a prior agreement, and its applicability is interdicted by Article I, Section 10, of the United States Constitution [the Contract Clause]." *Id.* at 319.

[23] *See* notes 49 and 57, *infra*. In its memorandum of May 15, the district court ruled, *inter alia*, that §§ 8 and 9 of ch. 581 are in conflict with paragraph 4 of the 1974 § 13(c) agreement, and thus with the Supremacy Clause.

space Workers ("the Machinists").[24] This separate matter will be considered in Part IV of this opinion.

II

We first consider the Transit Union's claim that Chapters 405 and 581 are unconstitutional under the Supremacy Clause because they conflict with the 1974 § 13(c) agreement. The district court held that no such conflict exists, but here we shall assume the contrary. For one thing, an arbitrator, appointed under the terms of the 1974 Agreement has found that a conflict exists. For another thing, the plain language of the § 13(c) agreement quoted above appears to conflict with the two state chapters. Section 4 of the § 13(c) agreement, for example, states that arbitration rights are protected to the extent they are provided for by "applicable laws and/or existing collective bargaining agreements." Yet, the arbitration procedure set forth in Chapter 405 is arguably less favorable to the union than that contained in the "existing" (1973) "collective bargaining agreement." The district court read the language of § 4 to mean that it protected arbitration rights only insofar as those rights were also protected by "applicable law." 511 F. Supp. at 318-319. But the words "and/or" commonly mean "the one or the other or both." And thus § 4 would seem to protect arbitration rights provided by the 1973 "collective bargaining agreement" even if those rights are not provided for by "applicable law." We believe it reasonable for purposes of this opinion to assume that there is a conflict between state law and federal assurance.

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[24] The Machinists claim that their (separate) collective bargaining agreement prohibits the MBTA from laying off their members. The district court enjoined the proposed lay offs and the MBTA appeals.

The more difficult question is, in case of conflict, which prevails, federal assurance or state law? This is a question of Congressional intent. Barring some constitutional restraint, Congress plainly has the power to enact a law forbidding states that accept federal money from passing laws inconsistent with a federal statute, inconsistent with regulations made pursuant to the statute, or inconsistent with assurances made pursuant to the statute or those regulations. *E.g., King* v. *Smith,* 392 U. S. 309, 333 n.34 (1968). The issue here, therefore, is whether Congress intended § 13(c), or, to be more specific, whether it intended assurances made pursuant to § 13(c), to override conflicting state law. If not, state law governs—although the federal statutory scheme may provide other remedies for violation of an assurance.

The language of the statute does not itself answer the relevant question. It simply provides that '[i]t shall be a condition of assistance . . . that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance." And, it goes on to list certain matters that the "protective arrangements" shall include. 49 U.S.C. § 1609(c). It would be consistent with this language that "arrangements" approved by the Secretary automatically invalidate conflicting state law. It is equally consistent with this language that such "arrangements" do not invalidate state law, but that a state with laws that prevent the making of "fair and equitable arrangements," cannot obtain or retain federal assistance. To decide the Supremacy Clause question, we have examined the UMTA statutory scheme in light of its legislative history and prior case law. Our examination convinces us that Congress intended state law, not § 13(c) assurances, to prevail in case of a conflict. We base this conclusion upon express language contained in the legislative history, upon the fact that a contrary holding risks distorting UMTA's basic purposes, and upon the practical difficulties that would accompany a contrary result.

A

We have examined the statute's legislative history with care. In doing so, we are mindful that the courts ought not to void state statutes—particularly those dealing with local economic matters—in the absence of a clear Congressional intent to preempt them:

> If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of the intention to do so. The exercise of federal supremacy is not lightly to be presumed.

Schwartz v. *Texas,* 244 U. S. 199, 202-203 (1952). *See New York Department of Social Services* v. *Dublin,* 413 U. S. 405, 413 (1973); *cf. National League of Cities* v. *Usery,* 426 U. S. 833 (1976). A careful examination of the legislative history reveals no evidence of any intent that a § 13(c) assurance supersedes state law; rather, that history reveals the contrary.

1. The first UMTA bills, introduced in Congress in the early 1960's, contained no labor protection provisions. Those provisions, which later became § 13(c), appeared in Congress when Secretary of Labor Willard Wirtz presented them to the Senate and to the House Committees on Banking and Currency in 1963. Secretary Wirtz first pointed out that the Labor Department had drafted the provisions after discussions with the Amalgamated Transit

Union and the AFL-CIO. The unions argued that labor protection was needed for two reasons. UMTA money might be used by the states to buy existing private transit companies.[25] Under the law in some states if a private transit system became publicly owned, its workers would lose their rights to strike and to bargain collectively.[26] UMTA funds might also be used for automation leading to a loss of jobs.[27] Thus, as Secretary Wirtz explained it, § 13(c) was to provide "transitional" protection.[28]

Second, Secretary Wirtz explained how the labor protection provisions work. He made clear that the provisions would give the Labor Department a weapon—in the form of UMTA grants—that could be used to encourage states to modify laws to allow, for example, collective bargaining, or to look for ways around existing anti-union statutes.[29] If a state could not satisfy the Secretary that it had found some lawful method to provide the protection that § 13(c) required, the Secretary would prevent the state from receiving UMTA assistance. Thus, Secretary Wirtz testified that § 13(c) would "affect" state law, but it would not "override" state law.[30]

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[25] *See* H.R. Rep. No. 204, 88th Cong., 2d Sess. 4, *reprinted in* [1964] U.S. Code Cong. & Ad. News 2569, 2583; [hereinafter *House Report*]; S. Rep. No. 82, 88th Cong., 1st Sess. 29 (1963) [hereinafter *Senate Report*].

[26] During the hearings on UMTA, labor officials pointed to Dade County, Florida as an illustration of a situation where employees of a privately operated transit system lost their collective bargaining rights when the county took over the operation of the system. .*See Urban Mass Transportation—1963: Hearings on S. 6 and S. 917 Before the Subcomm. of the Senate Comm. on Banking and Currency,* 88th Cong., 1st Sess. 324, 325 (1963) [hereinafter *Senate Hearings*] (statement of Bernard Cushman); *Urban Mass Transportation Act of 1963: Hearings on H.R. 3881 Before the House Comm. on Banking and Currency,* 88th Cong., 1st Sess. 487 (1963) [hereinafter *House Hearings*] (statement of Andrew J. Bielmiller).

[27] *See* authorities cited at note 25, *supra.*

[28] *Senate Hearings, supra* note 26, at 308.

[29] *See* note 34, *infra.*

Third, the Secretary emphasized the breadth of the discretionary power that § 13(c) gave to the Labor Department and the "flexibility" with which that discretion must be exercised.[31] Thus, he told the House Committee that the Labor Department had the need for "flexibility" in mind "when the standards in the proposal were drafted."[32] The provisions provided flexibility both because the standard used—"fair and equitable arrangements"—was a highly general one and because the statute allowed the Secretary to take "account of the fact that different answers may be appropriate in different cases."[33] Indeed, in response to questioning, the Secretary stated that the provision did not even require him to withhold funds from a state with a law prohibiting collective bargaining among municipal employees. Even in such a case he would search for ways to work out arrangements that would allow the state to participate in the program.[34]

Fourth, the Secretary specifically focused upon the question of whether § 13(c) assurances would supersede state law. In response to questioning in the Senate, he said, "I should like it quite clear that I think that there should be no superseding here of the State law."[35] The Senate Committee Report on the Bill subsequently stated,

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[30] *Senate Hearings, supra* note 26, at 312-313.

[31] *House Hearings, supra* note 26, at 482.

[32] *Id.*

[33] *Id.*

[34] *House Hearings, supra* note 26, at 482-483, 484-485.

[35] *Senate Hearings, supra* note 26, at 313.

> In regard to the question as to whether these [§ 13(c)] provisions would supersede State labor laws, the committee concurs in a statement made by the Secretary of Labor "that there could be no superseding of State laws by a provision of this kind."[36]

The Secretary also responded to a question by a Congressman about the relation of § 13(c) to state law by saying that the Labor Department's proposal "is submitted on this basis . . . that the state laws must control."[37] When questioned by Congressman Wilson about whether he anticipated the "need for changes in any State laws in order to qualify any authority for funds under the provisions of the amendment", Secretary Wirtz responded:

> We are not relying upon any such changes, or assuming any such changes. *We are also assuming that the State laws would be controlling in the situation.* But, on the constructive side of my answer, it is also a responsible determination in the light of experience that there would be few, if any, situations, in which the interests of a community in this program where State laws are applicable and practices applicable to collective bargaining would enter and the interests reflected in this proposed amendment could not and would not be reconciled affirmatively. It would be possible in our judgment to take care of that. (emphasis added.)[38]

In sum, as seen by the Secretary of the Department that drafted § 13(c) (as well as by the Senate Committee that reported it), that section, together with UMTA funds, provided the Department with strong, flexible and discretionary power to encourage states to modify or to find ways around state laws or practices that, for example, inhibited collective bargaining. That section, in their view, clearly did not give the Secretary the power to override state law.

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[36] *Senate Report, supra* note 25, at 29.

[37] *House Hearings, supra* note 26, at 482.

[38] *Id.* at 486.

2. On the floor of the Senate, Senator Williams, one of the bill's chief sponsors, Senator Sparkman, the Chairman of the relevant subcommittee, and Senator Morse, a leading advocate of labor protection, all stated that § 13(c) was not intended to override state law. The reason for this unusual degree of explicitness is that two senators—Tower and Goldwater—claimed the contrary and sought to eliminate or to modify that section. Senator Tower based his claim upon the fact that the Senate Committee had struck out a proviso that would have allowed the "'encouragement of collective bargaining rights to the extent not inconsistent with state law." 109 Cong. Rec. 5322, 5415 (1963).[39] He

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[39] Senator Tower stated:

> Another matter relating to the labor section is extremely important. A number of States have, in one form or another, restrictions prohibiting certain labor activities by employees of the State and its political subdivisions. Would Federal assistance be given to States whose labor laws conflict with the labor provision in this bill? Would the labor provisions in this bill supersede the laws of the various States? The Secretary of Labor indicated there would be no superseding of State law but said the question of whether there would be an effect was a somewhat different question. However, in section 10(c)(2) of the bill, in the language referring to the enforcement of the prevention of curtailment of collective bargaining rights . . . , the words "to the extent not inconsistent with State or local law"—approved in subcommittee—were deleted from the bill in full committee. From this, one can only assume that this measure could be enforced in a manner not consistent with State or local law. . . .

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was joined by Senator Goldwater (who also sought to strike out § 13(c)).[40] Senator Williams responded to their argument by stating:

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Secretary Wirtz, in referring in his testimony to the situation in Dade County—where, as I have mentioned, there was a loss of collective-bargaining rights, due to the establishment of a new transit system operated by the municipality—said that in the application of Senate bill 6 to situations of that kind:

> There would be a question that would have to be squarely faced, as to whether or not Federal funds should be used in connection with a situation of that kind, unless better arrangements could be worked out for the preservation of collective bargaining rights.
>
> Will State laws be superseded, if not in one way, in another? The question is certainly raised as to whether the Administrator will be forced to deny assistance to certain States. Or would he deny assistance to certain States only until they changed their laws? The point is not at all clear, because no testimony was made available to the committee after the deletion of the words "not inconsistent with State or local law."

109 Cong. Rec. 5322.

[40] Senator Goldwater remarked with respect to § 13(c) (also designated as § 10(c) or § 19(c) in various bills):

> The enactment of this provision would represent a complete reversal of the public policy of the United States, which for over a quarter of a century, as enunciated in the Wagner Act and the Taft-Hartley Act, has specifically excluded by definition, any State or political subdivision thereof from all obligations imposed by the Federal Labor-Management Relations Act, including the requirement to bargain collectively with representatives of its employees. Both the Wagner Act and the Taft-Hartley Act have long recognized the right of the States, local governments, and communities to regulate

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> not put the force of a mandate on a community. . . . I do not believe we can pass a law which would change State law; and we do not attempt to do so. . . .

Id. at 5417. (emphasis added.)[41] Senator Sparkman

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[41] Following Senator Williams' statement, this exchange ensued:

> Mr. Miller: Is it the intention, so far as the Senator from New Jersey and the committee are concerned, to the best of the Senator's knowledge, that the provision which is the subject of the amendment of the Senator from Arizona shall not be inconsistent with State law?
>
> Mr. Williams of New Jersey: Is that another way of saying that it cannot preempt or be a substitute for State law?
>
> Mr. Miller: I should think so.
>
> Mr. Williams of New Jersey. That is my answer. It was the same answer the Secretary of Labor gave to the committee.
>
> Mr. Tower: Mr. President, will the Senator from Arizona yield, that I may propound a further question to the Senator from New Jersey.
>
> Mr. Goldwater: I yield for that purpose.
>
> Mr. Tower: If that is the case, why did we strike from the bill, reported by the Committee on Commerce, on page 26, line 17, the collective bargaining section: "to the extent not inconsistent with State or local law"?
>
> If it is our intent not to be inconsistent with State or local law, why was that provision deleted?
>
> Mr. Williams of New Jersey: The answer is very simple. The provision should not have been included in the first place. If we had not made a mistake in the first place by doing what was unnecessary, it would not have been necessary to delete that provision.
>
> Mr. Tower: I still do not understand the point in taking it out if, as the Senator has said, it is not the intent to be inconsistent with State law.
>
> Mr. Williams of New Jersey: Must we, in every paragraph of every bill, say, "The action under the authority of

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added a similar view, *id.* at 5418[42] and the effort to strike the section was defeated. *Id.* at 5420.

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> this legislation shall be in conformity with the Constitution of the United States"?
>
> Mr. Tower: What reflects legislative intent more clearly than the language which was deleted from the bill?
>
> Mr. Williams of New Jersey: I am sure the Senator knows that if one makes a mistake, he should not try to preserve it. In our legislative history, shall we magnify a mistake which we made together?

109 Cong. Rec. 5417-5418.

[42] Senator Sparkman's remarks, and the reactions of Senators Goldwater and Towers were recorded as follows:

> Mr. Sparkman: . . . I know that the language was written. It was done clearly with the idea that while there would be an encouragement of a continuation of collective bargaining rights, it was not intended to supersede State laws. I believe the questioning of the Secretary of Labor indicates our concern about that. It was not our intention to supersede State laws, and we do not intend, I am sure, to do so. We do not believe that the language has that effect.
>
> Mr. Goldwater: If we are to depend on the Secretary's testimony for legislative history, neither side has much of a leg to stand on, because this language is about as fuzzy-wuzzy as any I have ever tried to read. It reads like some of the texts on proper punctuation, because when one gets through reading it, it is just a lot of language.
>
> Mr. Tower: Actually, the Secretary was testifying on the basis of the language he submitted to the committee, not the language which was finally provided in the bill.
>
> Mr. Sparkman: That is correct.
>
> Mr. President, will the Senator from Arizona yield further?
>
> Mr. Goldwater: I yield.
>
> Mr. Sparkman: I admit that in reading the Secretary's answer, there is a chance of someone's misunderstanding it.

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Senator Tower then sought to amend § 13(c) to require only arrangements "consistent with the laws of the State in which the project is located." *Id.* at 5421. Again, he argued that without this proviso § 13(c) might override state law. The amendment was defeated, in part, because, as Senator Williams stated again and again, it was unneces-

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But if the entire statement is read, I think we find that he clearly said it will not supersede State laws.

He was asked, "Does it affect them?" He replied, "That is different"—and it is. If it has any effect whatever on them, that would be covered by the word "effect." I think the Secretary was splitting hairs when he tried to make that distinction. Of course it might have an effect upon State laws, but even in that connection he repeated his statement that it will not supersede or displace or override them.

Mr. Goldwater: Let me read what Secretary Wirtz said, as it appears on page 313. His statement was made in answer to a question by the Senator from Texas [Mr. Tower]:

> But I should like it quite clear that think that there could be no superseding here of the State law.

But that is not a statement on which one could rely with any conviction. He merely said he thought there could be no superseding of State law. . . .

Mr. Sparkman: Let me point out that at another place Secretary Wirtz said "surely" this amendment would not supersede State laws.

Mr. Goldwater: On what page is that statement to be found?

Mr. Sparkman: On page 312, near the bottom.

Mr. Goldwater: But he added "to the best of my knowledge."

109 Cong. Rec. 5418.

sary: § 13(c) did not supersede state law. *Id.*[43] The real issue at stake, however, was not the question of override; the real issue was whether the Secretary of Labor would have the power to use § 13(c) as a weapon to encourage states to modify anti-union laws or to look for ways around those laws in the case of municipal transit workers (particularly those "acquired" from private companies with UMTA funds.) Senator Tower's amendment would have severely limited the Secretary's power to insist upon changes in state law as a condition for receiving funds—the very power that Secretary Wirtz had sought. The defeat of that amendment allowed him that power. Senator Javits explained the matter clearly:

> The reason I oppose the amendment is that I believe the provisions with respect to labor are in balance now, so far as Senators like myself are concerned. I should like to state my understanding or the situation and why I believe the amendment will complicate it rather than improve it.
>
> My understanding of the amendment is that the Secretary of Labor, under the bill, cannot supersede State law. If State law makes it impossible for the employees of municipal transit systems to bargain collectively, then it makes it impossible. There is nothing

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[43] Senator Williams also stated:

> To provide specifically that the rights could not be inconsistent with State law would be to imply that without such language there is the possibility of the program being inconsistent with State law which we know is not the fact. If the language is put in, it seems to me, while it might seem a small matter in respect to this bill, it would set a precedent for other legislation, which I think would be dangerous.

Id. at 5423.

> in the bill that can override it. Indeed, I doubt that the Constitution will permit it, and I doubt that it can be done under any phase of the Taft-Hartley law.
>
> However, what it does, by not mentioning the proposition is to enable the Secretary of Labor . . ., to go into a State where a right-to-work law or some other law deprives the municipal employees—that is, employees of the transit system—of collective bargaining rights. Perhaps because the Administrator has money to give out, some States may be induced to make some accommodation on that score by the necessary exemption from the law or any interstate compact entered into with other States.
>
> Therefore, we have a balanced scheme. We do not override the law; at the same time, we do not compel the Federal Government to go in where the law is adverse to the interest of labor and labor's own point of view, and perhaps also even give encouragement to exempt a situation of this kind where the State desires to get this type of Federal help.
>
> I think that is giving something on both sides, while at the same time not giving the Administrator instructions, which is what the amendment would do, that he must go into such States, notwithstanding the fact that the municipal transit system workers might be deprived of collective bargaining rights.
>
> Therefore, I believe the amendment should be rejected.

109 Cong. Rec. 5422 (1963).

Subsequently, Senator Morse, a strong supporter of labor protection, added that under § 13(c), "The state can continue its state policy if it wishes to; but . . . the State should not be allowed to receive Federal money with which to continue a policy that is in conflict with sound Federal policy." *Id.* at 5672. He added that the final § 13(c) provision "does not supersede any State policy." Id. at 5673.

Thus, the Senate debate reveals not a single senator who intended § 13(c) to override conflicting state law. It contains explicit statements by sponsoring senators that they intended the contrary and believed that § 13(c) carries out their intent. The senatorial remarks to the contrary are not supported by legal argument and were made by senators as part of an argument for an amendment that went well beyond removing any direct conflict between § 13(c) and state law.

3. The Senate debate was repeated in the House of Representatives. Some Congressmen articulated fears similar to those of Senators Tower and Goldwater. They feared that the legislation would override state law. *See, e.g.,* 110 Cong. Rec. 14979 (remarks of Rep. Taft). The bill's sponsors, however, assured the House that § 13(c) was not intended to override conflicting state law. Thus, Congressman Multer stated that "[n]othing in this bill and nothing in any amendment thus far adopted will infringe upon local law, whether it be of a State or municipality." *Id.* at 14980. And, Congressman Rains argued "that there is not one line in this bill that would vitiate in any way any State or local law. . . ." *Id.*

In sum, the legislative history reveals one explicit statement after another, made by the bill's drafters, the bill's sponsors in the Senate, and those who sponsored it in the House, that § 13(c), while designed to prod the states is not intended to lead to the invalidation of any state law.

B

It might be argued, however, that this legislative history does not dispose of the matter because it does not explicitly consider the effect of § 13(c) on new state law enacted *after* the state has accepted UMTA funds. Indeed, the union here does not argue that § 13(c) assurances override preexisting state law; it claims they override subsequently enacted state law. We do not believe, however, that this distinction is determinative for the following reasons.

First, there is nothing in the legislative history of UMTA suggesting a need to draw this distinction. Rather, the history quoted above suggests that the senators and congressmen who drafted, sponsored, and voted for the bill believed that § 13(c) would not override *any* state law. And, there is no indication at all that both the statute *and* the detailed assurances given pursuant to § 13(c) were intended to predominate in case of conflict.

Second, if as the Transit Union contends, § 13(c) assurances override state law, Congress, in enacting § 13(c), to a significant extent federalized collective bargaining with local transit unions. Section 13(c) assurances consist of detailed documents, negotiated between transit authority and union, containing hosts of conditions related to wages, hours and working conditions—conditions that could govern the relations between the parties for years to come. To give these documents the authority of federal law overriding state law to the contrary would transfer predominate legal authority for local transit labor relations from state to federal government. The statute would have created a federal involvement in local transit labor relations akin to that which now exists with respect to railroad and airline workers. *See generally International Association of Machinists* v. *Central Airlines, Inc.,* 372 U.S. 682, 687 (1963).

Whether or not such a federal presence is desirable, we cannot interpret the ambiguous language of § 13(c) to create it without a fairly clear indication that such was Congress's intent. Unlike railway and airline workers, we are here considering workers for *local* transit companies whose employers, by and large, are municipalities or state governments. *Cf. National League of Cities* v. *Usery, supra.* Moreover, in the National Labor Relations Act Congress explicitly exempted public employees, such as MBTA workers, from federal labor legislation. *See Local Division 589, Amalgamated Transit Union* v. *Amalgamated Transit Union,* 295 F. Supp. 630, 632 (D. Mass. 1969). Had Congress intended to grant the Secretary of Labor NLRB-type (or more) power to override state law governing these local public employees, one would expect to find some indication that Congress at least thought about the matter. But instead, the legislative history is silent. Not a word indicates that Congress intended such a result. The unions in 1963 urged no such outcome.[44]

To the contrary, the legislative history suggests that Congress was sensitive to the local nature of local transit; it "expected that specific conditions [in § 13(c) assurances] normally will be the product of local bargaining and negotiations;" *Senate Report, supra* note 25, at 28; *see House*

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[44] Indeed, the prime concern advanced by labor leaders with respect to § 13(c) was that while they agreed with its objectives, it was excessively general. Thus, they proposed a more detailed amendment, which provided, in part, that fair and equitable arrangements "shall be available to all . . . employees and shall not be limited to employees of existing mass transportation systems but shall "include employees employed on any new project, system, line, operation, or facilities. . . ." *House Hearings, supra* not 26, at 494-495 (statement of Andrew J. Bielmiller). In particular, they pressed that a provision be added which would authorize binding arbitration, *id.,* a proposal which was rejected by Congress.

Report, supra note 25, [1964] U. S. Code Cong. & Admin. News at 2584-2585;[45] and its members made the many statements previously discussed suggesting the legal supremacy of state law.

Third, § 13(c)'s framers intended a limited set of provisional protections. Secretary Wirtz testified that "we are concerned particularly only about the *transitional* effects upon particular employee groups . . . [caused by] consolidation, merger, acquisition of various lines or the establishment of new systems beside or in some cases replacing old systems [or by the] establishment of programs of technological improvement." *Senate Hearings, supra* note 26, at 308 (emphasis added.) To erect upon § 13(c) assurance a near permanent set of specific collective bargaining conditions which the state cannot change is to go beyond this limited purpose.

Fourth, to find that specific § 13(c) assurances override state law would also go beyond § 13(c)'s objective of assuring "fair and equitable" arrangements. Clearly, a state law could modify a particular § 13(c) assurance without inevitably bringing about an unfair or inequitable result. It has not been shown, for example, that the new system provided by Chapters 405 and 581 is basically unfair or inequitable; it is simply claimed that those chapters change the 1973 Basic Agreement permanently frozen in detail by the 1974 assurances. Congress's general intent to secure fair arrangements does not require the implementation of any *particular* set of detailed provisions. Indeed, if the specific detailed provisions of a § 13(c) assurance prevail over *any* conflicting change in state law, the Secretary of Labor would lose any ongoing power to exercise discretion—to decide whether or not a change makes the state system as a whole unfair to the transit workers. This result would be anomalous given a legislative history stressing the need for flexibility and discretion. *See* note 34. *See also Kendler* v. *Wirtz,* 388 F. 2d 381, 383 (3rd Cir. 1968); *City of Macon* v. *Marshall,* 439 F. Supp. 1209, 1223-1224 (M.D. Ga. 1977).

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[45] We note, moreover, that the U.S. Department of Labor has recognized the validity of state law in its implementing regulations. 29 C.F.R. § 215.3(a)(2) (1980) provides:

> In instances where state or political subdivisions are subject to legal restrictions on bargaining with employee organizations, the Department of Labor will utilize special procedures to satisfy the Federal statute in a manner which does not contravene state or local law. For example, employee protective terms and conditions, acceptable to both employee and applicant representatives, may be incorporated into a resolution adopted by the involved local government.

Fifth, § 13(c) assurances need not override state law to make § 13(c) enforceable. The threat of receiving no further UMTA funds would often prevent a state currently receiving those funds from changing its laws contrary to the policy of § 13(c). If not, the Secretary might halt the flow of funds or take other appropriate action. In any event, such an enforcement scheme is more consistent with Congressional intent than the alternative urged upon us by the Transit Union; namely, that § 13(c) permanently binds states to the details of § 13(c) assurances and referenced collective bargaining agreements entered into perhaps a decade earlier, regardless of whether changes in state law are, in any overall sense, unfair. Even if such a system is desirable, the legislative history of UMTA suggests that Congress did not intend to create it.

C

The Transit Union has cited several cases that it believes stand for the proposition that § 13(c) assurances supersede state law. We have found no case, however, which is both directly on point and which considers the issue in detail. The Union cites many cases which deal with *other* federal statutes. These include *International Association of Machinists* v. *Central Airlines, Inc.*, 372 U. S. at 689-91 (§ 204 of the Railway Act, 45 U.S.C. § 184); *Ivanhoe Irrig. Dist.* v. *McCracken*, 357 U. S. 275, 291-294 (1958) (Reclamation Act of 1902); *International Brotherhood of Teamsters* v. *Oliver*, 358 U. S. 283, 297-297 (1959) (§§ 7 and 8 of the National Labor Relations Act, 29 U.S.C. §§ 157 and 158); *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448, 456-457 (1957) and *Teamsters Local* v. *Lucas Flour Co.*, 369 U. S. 95, 102-103 (1962) (substantive law to be applied in suits under § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 184). In each of these cases, the Court held that federal law is preemptive. Yet, these cases are not persuasive here where we deal with a different statute, with different statutory objectives, and with a different legislative history.

Most of the UMTA cases cited by the Union do not deal with the precise question here at issue. Thus, in *Local Division 714, Amalgamated Transit Union, AFL-CIO* v. *Greater Portland Transit District*, 589 F. 2d 1 (1st Cir. 1978) we decided a jurisdictional question. We held only that a union "does have a federal cause of action, implied from UMTA § 13(c), to enforce the labor protective arrangements to which the [Greater Portland Transit] District agreed to as a condition of federal financial assistance under the Act." 589 F. 2d at 16. We further noted that future "enforcement litigation will surely involve interpreting the protective arrangements in light of the purposes and policies of § 13(c), as well as resolving issues relating to the interplay between federal and state labor policies and possible supremacy clause problems." *Id.* at 13. We did not decide the question of whether § 13(c) requires that state law be subordinated to § 13(c) assurances. The Transit Union has cited language in that case that might imply such subordination. To the extent that it does so, however, we hereby disapprove it.

Several other cases cited also deal with the same jurisdictional question at issue in *Greater Portland*. Thus, the Sixth Circuit, *Local Division 1285, Almagamated Transit Union* v. *Jackson Transit Authority*, 650 F. 2d 1379 (6th Cir. 1981), the Seventh Circuit, *Local Division 519, Amalgamated Transit Union* v. *LaCrosse Municipal Transit Utility*, 585 F. 2d 1340 (7th Cir. 1978); and the Eighth Circuit, *Division 1287, Amalgamated Transit Union* v. *Kansas City Area Transportation Authority*, 582 F. 2d 444 (8th Cir. 1978), *cert. denied*, 439 U. S. 1090 (1979), also reached the conclusion that a claim of breach of a § 13(c) agreement sets forth a dispute cognizable in federal court;[46] in none of these cases did the court explicitly explore the problem of a conflict with a state law, and in none did the court decide whether, as a matter of general principle, assurances provided under § 13(c) govern in the face of a conflicting state statute.

We recognize that there are dicta in *Jackson* and *Kansas City Area Transportation Authority* which appear to support the Transit Union's position.[47] And, subse-

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[46] Similarly, *see Division 1235, Amalgamated Transit* v. *Metropolitan Transit Authority*, 650 F. 2d 1389 (6th Cir. 1981); *Division 1212, Amalgamated Transit Union* v. *Chattanooga Area Regional Transportation Authority*, 483 F. Supp. 37, 39 (E.D. Tenn. 1979).

[47] In *Jackson, supra*, the Sixth Circuit stated:

> It is undisputable that Section 13(c) reflects national labor policy. See 109 Cong. Rec. 5670. Indeed, the legislative history reveals that several senators were concerned about possible conflicts between Section 13(c) and state law, particularly in the area of the right to strike. *Id.* at 5672-73. Senator Morse, the chief sponsor of the bill which became Sec-

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quent to the decision of the Eighth Circuit, a district court ruled, in an alternative holding, that where state law and a

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> tion 13(c), assured his colleagues that state laws forbidding public employee strikes would supersede national labor policy, but *only* where the right to strike was concerned; *all other* collective bargaining rights would be protected. *Id.* at 5671-73. . . .
>
> * * *
>
> Jackson points out, correctly, that Section 13(c) was designed to encourage flexibility in formulating labor protective "arrangements." Senator Morse himself suggested that if local law prohibits collective bargaining by municiple employees, alternative solutions such as entrusting management of the transit authority to a private commission which *could* legally bargain with the union might be explored. *See also* Department of Labor Guidelines, 43 F.R. 13558 (3-31-78). The point, of course, is not that Congress was willing to make allowances for local problems. Rather, the point is that to qualify for federal funds, municipalities *must*, one way or another, undertake to protect the collective bargaining rights required by national labor policy.

650 F. 2d at 1385-1386.

In a similar vein, the Eighth Circuit has stated:

> We recognize that under the laws of some states employees of public agencies are not accorded collective bargaining rights nor do they enjoy the benefits of such bargaining, including arbitration. We think, however, that when a state or a combination of states forms a public transit agency for the express purpose of obtaining federal money to enable it to take over the business of a private transit company, and where the agency in order to obtain the money enters into a § 13(c) agreement that calls for interest arbitration, the obligation to arbitrate is binding on the agency, regardless of general state law or policy.

Because the opinions do not explore the precise nature of the conflict between state statutes and federal assurances, we are uncertain of the extent to which their language directly conflicts with our holding here.

§ 13(c) agreement are in conflict, state law must yield. *Division 1287* v. *Kansas City Area Transportation Authority,* 485 F. Supp. 856, 863-864 (W.D. Mo. 1980). *But see generally Division 580, Amalgamated Transit Union* v. *Central New York Regional Transportation Authority,* 556 F. 2d 659, 662 (2d Cir. 1977) (suggestive of support for proposition that state law need not yield when in conflict with § 13(c) agreement). Several unpublished opinions also lend support to the Transit Union's position. None of these opinions, however, consider the issue in depth, and we have determined not to follow them.

For these reasons, we hold that the specific detailed assurances given by a union and a transit authority to the Labor Department under (UMTA) § 13(c) do not invalidate a state law to the contrary.

III

The Transit Union also claims that Chapters 405 and 581 are unconstitutional because they impair the obligations of the 1973 Basic Agreement, thereby violating the Contract Clause of the United States Constitution. ("No State shall . . . pass any . . . law impairing the Obligation of Contracts. . . ." Art. I., § 10.) The MBTA disputes the district court's holding that portions of Chapter 405 and all of Chapter 581 violate the Contract Clause. We agree with the MBTA that these chapters do not violate the Clause.

For one thing, the Basic Agreement may well have expired before Chapters 405 and 581 took effect. Although language in the Agreement appears to extend it indefinitely into the future, a Massachusetts state court recently held that, at least for purposes of injunctive relief, the agreement has terminated. On January 7, 1981, the Massachusetts Superior Court, per Judge Young, stated that the Transit Union contract (among others) contains:

> language implying that the prior contract provisions remain in effect until a new contract is negotiated. For injunctive purposes, this Court concludes that it is unreasonable to interpret these provisions so as to continue the prior provisions forever. . . . Accordingly, for purposes of granting injunctive relief, this Court shall set a six month period to injunctive relief granted on the basis of such contracts since this seems a reasonable time within which the parties may renegotiate them.

Gallahue v. *MBTA,* Mass. Superior Court, Suffolk County No. 45917, slip op. at n.1 (January 7, 1981).[48] On July 1, 1981, Judge Young denied plaintiffs' motion to extend the injunction, presumably on the ground that the collective bargaining contract was no longer in effect. If Judge Young's opinion constitutes an authoritative interpretation of the Basic Agreement, the Contract Clause would not be violated, for Chapters 405 and 581 apply only to future negotiations,[49] when the Basic Agreement would no longer be in effect. It has been clear since 1827 that the Clause applies only to laws with retrospective, not prospective, effect. *Ogden* v. *Saunders,* 12 Wheat. 213 (1827). *See also* Schwartz, *Old Wine in Old Bottles: The Renaissance of the Contract Clause,* [1979] *Supreme Court Rev.* 95, 99.

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[48] *See* note 21 *supra.*

[49] Defendants have stated that the laws here at issue are designed to apply to MBTA contract negotiations subsequent to their enactment.

The federal district court also suggests in its supplementary memorandum of May 15, 1981, that the Contract Clause problem may no longer exist because the Commonwealth had asserted on May 13, 1981, "that the parties have agreed to terminate the 1973 agreement and write a new one." As the court goes on to note, however, the record is unclear on this point—and the Transit Union has asserted in this court that as far as it is concerned, the collective bargaining agreement remains in effect.

For another thing, even if the Superior Court's decision is not to be taken as a definitive state interpretation of the Basic Agreement, there are strong reasons for believing that the Agreement should be given this interpretation for purposes of applying the federal contract clause. Ever since the *Charles River Bridge* case, it has been the law that public contracts are to be strictly construed in favor of the state. *Charles River Bridge* v. *Warren Bridge,* 11 Pet. 420 (1837); Schwartz, *supra,* at 99. In holding that a company's charter to operate a toll bridge did not bar the state from authorizing the construction of a competing free bridge, the Supreme Court stated: "'[A]ny ambiguity in the terms of the contract must operate against the [company] . . . and in favor of the public'." 11 Pet. at 543, *quoting Stourbridge Canal* v. *Wheely,* 2 B. & Ad. 793. Similarly, the Court has written:

> Every reasonable doubt is to be resolved adversely [to the private party claiming under the contract]. Nothing is to be taken as conceded but what is given in unmistakable terms or by an implication equally clear. The affirmative must be shown. Silence is negation and doubt is fatal to the claim. This doctrine is vital to the public welfare.

Fertilizing Co. v. *Hyde Park,* 97 U. S. 659, 666 (1878). This doctrine illustrates the deference that federal courts must pay to state legislation if the Contract Clause is not to become a serious obstacle to the enactment of social or economic legislation that the states believe is necessary.

It is possible to interpret the terms of the Basic Agreement in a way that suggests the Agreement has terminated. Of course, if taken literally, the language of the Agreement would make it perpetual. Sections 600 and 601 of the 1973 Basic Agreement were amended by the Memorandum of Understanding (the 1979 collective bargaining agreement)[50] to provide that the Agreement will continue in force until December 31, 1980, "and from year to year thereafter unless changed by the parties." A party desiring change shall give notice, and if no agreement is reached on those proposals, "the parties shall submit the disputed issues to final and binding arbitration as provided for in this Agreement." This language literally requires perpetual use of the 1973 arbitration system. It would prevent either party from *ever* denouncing the Agreement through termination and seeking a totally new one, no matter how unsatisfactory it found the 1973 arrangement.

It is difficult to believe that the parties to the agreement thought they could bind their successors forever. Perpetual contracts would seem to be particularly inappropriate in the field of labor relations, where fluctuating economic circumstances ordinarily call for the ability to adapt to changes.[51] *See generally* D. Bok and J. Dunlop, Labor and the American Community 289 (1970) (unpredictable nature of long-term agreements). And, it seems unlikely that the parties in 1973 or 1979 believed that they had found a permanent solution to the MBTA's labor/management problems or that they thought they had prevented both the state and the Transit Union from ever again exercising their respective powers to achieve some other accommodation with changing realities. The parties were presumably aware that a perpetual agreement was unlikely to be enforceable at law. Not even in the area of property law—an area where legal relationships are traditionally stable and certain, have the courts allowed private parties to make arrangements lasting in perpetuity. *See* Restatement of the Law of Property § 370 (1944). State courts have interpreted commercial contracts that apparently called for perpetual arrangements, not to do so. *See Simons* v. *American Dry Ginger Ale Co., Inc.,* 335 Mass. 521, 524, 140 N. E. 2d 649-665 (1957). And, where such an interpretation has proved impossible in public collective bargaining agreements, they have struck such provisions down as contrary to public policy. *See, e.g., Niagara Wheatfield Administrators Association* v. *Niagara Wheatfield Central School District,* 385 N.Y.S. 2d 667, 669-670 (4th Dept. 1976). Massachusetts courts have recognized the particularly strong public interest at stake where government labor contracts are at issue; and, they have indicated their willingness to strike down or interpret away provisions in such contracts that run contrary to public policy, by, for example, imposing undue restrictions upon the freedom of action of public authorities. *See School Committee of Boston* v. *Boston Teachers Union,* Mass. , , 389 N. E. 2d 970, 973-974 (1979); *Watertown Firefighters* v. *Watertown,* Mass. , 383 N. E. 2d 494, 498 n.15 (1978).

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[50] *See* note 4 *supra.*

[51] Indeed, other "public employees" in Massachusetts are limited to collective bargaining agreements for a term not to exceed three years. Mass. Gen. Laws. Ann. ch. 150E, § 7 (cum. supp. 1981).

Under these circumstances, the fact that the Basic Agreement is silent as to the parties' authority to terminate completely or to denounce the contract (as contrasted with the power to "change" the contract) might well be interpreted to allow them to do so. Consistent with the express language, the interest arbitration provision might be interpreted as forbidding total termination of the contract only *for a reasonable time* after expiration of the contract's express term—in this instance December 31, 1980. Under any such interpretation of the contract—similar to that apparently reached by the Massachusetts Superior Court—there is no contract clause problem present here.

Nonetheless, it is conceivable that state courts reviewing the Basic Agreement in related cases will reach a different conclusion. Because of the need for expeditious resolution of this litigation, we have also considered the Contract Clause question on the assumption that the "perpetual duration" provisions of the Agreement are to be read literally. In that case, the narrow question before us is whether two subsequently enacted state laws (Chapters 405 and 581) can constitutionally override those provisions of the contract that provide for indefinite (or perpetual) extension (or renewal) of the contract's terms. We believe that they can.

The Contract Clause does not make unlawful *every* state law that conflicts with *any* contract that contains terms contrary to its provisions. Any such interpretation would make of the clause an insuperable barrier to necessary state legislation. It would threaten to make the Constitution unworkable. *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U. S. 398, 428, 434-435, 443 (1934).[52] As the Supreme Court has stated, "literalism of the construction of the contract clause . . . would make it destructive of the public interest by depriving the state of its prerogative of self-protection." *W. B. Worthem Co.* v. *Thomas*, 292 U. S. 426, 433 (1934). Thus, the courts have interpreted the clause so as to harmonize the state's need to legislate in the interests of its citizens with the need to protect investors and other contracting parties against repudiation of a debt or obligation. In doing so, at least since the early 1930's, they have struck down state laws only infrequently.[53]

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[52] *See generally* Comment, *Revival of the Contract Clause: Allied Structural Steel Co.* v. *Spannaus and United States Trust Co.* v. *New Jersey*, 65 Va. L. Rev. 377, 381-385 (1979).

In applying the clause, courts have examined the strength of the relevant interests of the private parties and those of the state. They have considered the nature of the private party's investment, which could take the form of labor as well as capital: to what exent has a party *worsened his pre-existing circumstances* by entering into, and relying upon, the contract? Moreover, the courts have examined the extent to which the party might reasonably have relied upon enforcement of the contractual promise in order to protect his investment. Thus, it is not surprising that the courts have upheld laws where these interests are likely to be weak, such as where a law would have basically prospective application, *Ogden* v. *Saunders, supra,* or where a retrospective law would modify, not substantive rights, but pre-existing contractual remedies. *Penniman's Case,* 103 U. S. 714 (1881). *See Worthem Co.* v. *Kavanaugh,* 295 U. S. 56, 60 (1935); *Home Building & Loan Ass'n* v. *Blaisdell,* 290 U. S. at 434 n.13 (collecting "remedy" cases); *Mason* v. *Haile,* 12 Wheat. 370 (1927). *See also Sturgis* v. *Crowninshield,* 12 Wheat. 122, 200, 201 (1819). As the Supreme Court recently stated, "a reasonable modification of statutes governing contract remedies is much less likely to upset expectations than a law adjusting the express terms of an agreement." *United States Trust Co.* v. *New Jersey,* 431 U. S. 1, 20-21 n.17 (1977).

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[53] Until very recently, some commentators considered the clause a "dead letter". *See* G. Gunther, Cases and Materials on Constitutional Law 554 (10th ed. 1980); Schwartz, *supra* at 95-96.

Courts have also examined the type of legislation at issue to determine the importance and strength of the state's interest in legislating. *See, e.g., Stone* v. *Mississippi,* 101 U. S. 814, 817-818 (1880). They have frequently held that contracts are impliedly limited by, and subject to, the implicit authority of the state to exercise its "police power." *E.g., Allied Structural Steel* v. *Spannaus,* 438 U. S. 234, 241 (1978); *Home Building & Loan Ass'n* v. *Blaisdell,* 290 U. S. at 435-436; *Stone* v. *Mississippi,* 101 U. S. at 817. And, the Supreme Court has defined "police power" for Contract Clause purposes, "as an exercise of the sovereign right of the Government to protect the lives, health, morals, comforts, and general welfare of the people. . . ." *Manigault* v. *Springs,* 199 U. S. 473, 480 (1905). The state's "paramount authority . . . is not limited to health, morals and safety. It extends to economic needs as well." *Veix* v. *Sixth Ward Ass'n,* 310 U. S. 32, 39 (1940). This doctrine reflects the importance of allowing states to legislate freely on social and economic matters of importance to their citizens, modifying the law to meet changing needs and conditions.

Following this doctrine, and of direct relevance here, the Supreme Court has upheld state laws that invalidated prior contractual obligations in the field of transportation; *see, e.g., New Orleans Pub. Serv.* v. *New Orleans,* 281 U. S. 682 (1930); *Denver & R.G.R. Co.* v. *Denver,* 250 U. S. 241 (1919); *Atlantic Coast Line R. Co.* v. *Goldsboro,* 232 U. S. 548, 558 (1914); *Northern Pac. R. Co.* v. *Duluth,* 208 U. S. 583, (1908); and, it has upheld newly enacted state labor laws that specifically set aside previously existing contracts to the contrary. *See, e.g., American Federation of Labor* v. *American Sash Co.,* 335 U. S. 538, 540 (1949); *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.,* 335 U. S. 525, 531-32 (1949).

An examination of the relevant interests in this case suggests those of the Transit Union are weak and those of the Commonwealth of Massachusetts correspondingly strong. For one thing, the Transit Union could not *reasonably* have relied upon the continued enforcement of the arbitration provision in the Basic Agreement as necessary protection for the investment of labor by its members. The very uncertainty as to the legality under state law of a contractual arrangement purporting to be perpetual would make reliance upon its lasting unreasonable. *See* p. 44 *supra.* Moreover, the contractual provisions at issue here are concerned with the form of the arbitral process and the procedure for determining wages, hours and working conditions; the provisions themselves do not set those terms.[54] They are thus procedural and therefore more akin to a contractual remedy than a contractual right. The Transit Union and its members cannot easily say what terms will result from the new procedure; or how those terms will differ from those that the prior procedure would have provided. They may fear the new procedure will lead to less favorable substantive terms; but so may creditors have feared that changes in contractual remedies (*e.g.* abolition of imprisonment for debt) would make it harder to collect their debts. Yet due to the diminished nature of the reliance involved, such procedural changes in remedy have long been allowed. *See* cases cited at p. 47, *supra.* Further this is not a case of investment given to the state with the expectation of the state returning it, securing its return, or returning an equivalent value through the enforcement at issue. The Transit Union's members have received the pay and working conditions they bargained for and in return for which they gave their labor. It is difficult to see how the promise that a particular arbitration procedure would be used indefinitely into the future—beyond the life of the express terms of the existing agreement—could have played more than a small role in an employee's decision to work for the MBTA. Finally, the Commonwealth, as far as possible, has sought to protect reasonable reliance and expectations by applying the laws at issue here only to future negotiations, when contracts expire subsequent to the enactment of those laws.[55]

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[54] And, the procedure was itself subject to change through use of the arbitration system.

For another thing, the state's interest in legislating in this area seems sufficiently strong to overcome the prior contract's restraints. Public transportation is vital to the state and to its economy. The difficulties of finding satisfactory methods for resolving labor disputes—particularly in the field of public employment—are well known. D. Bok & J. Dunlop, *supra* at 228 *et seq.* The state plausibly claims that the problems of cost and efficiency are great. One piece of legislation at issue here (Chapter 405) was enacted after a long impasse in bargaining, and the other (Chapter 581) was enacted during a period of fiscal emergency as part of a government effort to keep the system from closing down. The state's interests here would seem at least as great as those present in other cases where the Supreme Court upheld a state law's validity. *See, e.g., Stone* v. *Mississippi, supra* (state forbids lottery despite its grant of a twenty-five year lottery franchise to a firm three years earlier); *Faitoute Iron & Steel Co.* v. *City of Asbury Park,* 316 U. S. 502 (1942) (state law altered a municipal bond contract); *El Paso* v. *Simmons,* 379 U. S. 491 (1965) (state law modified a land-sale contract by reducing redemption period); *Fertilizing Co.* v. *Hyde Park, supra* (state law rendered company charter valueless); *Atlantic Coast Line R. Co.* v. *Goldsboro, supra* (state law restricted railway's contractually granted right to operate).

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[55] By contrast, in *Subway-Surface Supervisors Ass'n* v. *New York Transit Authority*, 44 N. Y. 2d 101, 375 N. E. 2d 384, 404 N.Y.S. 2d 323 (1978) and in *Sonoma County Organization of Public Employees* v. *County of Sonoma*, 23 Cal. 3d 296, 152 Cal. Rptr. 903, 591 P. 2d 1 (1979), the challenged legislation applied to the financial terms of existing contracts. In the former case, the legislation was upheld as "a necessary and appropriate" measure in a time of emergency. 44 N. Y. 2d at 113, 375 N. E. 2d at 390, 404 N.Y.S. 2d at 329. In the latter case, the court struck down the statute, finding, *inter alia*, that no "emergency" existed.

Moreover, it should be kept in mind that the state laws before us interfere with a prior contractual promise only to the extent that the promise would seek to prevent the state from *ever* changing the arbitration system. In other words, the narrow issue we are considering is whether the state can override a promise by one of its authorities made several years before that ties the hands of all future legislatures in an area of great importance to the public, concerning serious problems (labor/wage/cost/efficiency negotiations) where few would claim to have found even a provisionally satisfactory answer, let alone a permanent one. The Supreme Court has written that "the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty." *United States Trust Co.* v. *New Jersey,* 431 U. S. at 23. We do not believe that the Contract Clause grants the MBTA authority to restrict so significantly the power of future state legislatures.[56]

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[56] *Cf. School Committee of Boston* v. *Boston Teachers Union,* 389 N. E. 2d at 973: "Public policy . . . may limit the ability of a public employer . . . to bind itself to a given contractual provision or to delegate to an arbitrator the power to bind it."; *City of Taunton* v. *Taunton Branch of Mass. Police Ass'n,* 406 N. E. 2d 1298, 1302 (Mass. App. Ct. 1980) (legislative wariness of imposing arbitration).

The Transit Union has pointed out, however, that recently the Supreme Court, in *United States Trust Co.* v. *New Jersey* wrote that a state law impairing the state's prior contractual obligation is valid only if "it is reasonable and necessary to serve an important public purpose." 431 U. S. at 25. *See also Allied Structural Steel* v. *Spannaus,* 438 U. S. at 243-244, 247. The Union argues that Chapters 405 and 581 are not "reasonable and necessary" because there are other methods available—fare increases for example, that will resolve the MBTA's financial problems. The issue that the Union's claim puts before us is the extent to which we are to defer to the state legislature's judgment on these matters.

If we judge the legislature's actions "in the light of the facts made known or generally assumed," *cf. United States* v. *Carolene Products Co.,* 304 U. S. 144, 152 (1937), those actions are supportable. The legislature clearly felt that Chapters 405 and 581 represented a necessary response to the problems before it. We cannot disagree. The record here reveals the seriousness of the problems facing the MBTA and the alternatives that had been tried. We are aware, as the Supreme Judicial Court has pointed out, that the financial crises which beset the MBTA in late 1980 "threatened the availability of essential services of transportation to such an extent as to endanger the health, safety and welfare of the community." *MBTA Advisory Board* v. *MBTA,* Mass. Adv. Sh. (1981) 403, 407. The complex controversies revealed by the conflicting affidavits filed in the district court themselves, suggest that there is no "obvious" alternative to the legislature's approach. Thus, even without engaging in the normal presumptions favoring state legislation, *cf. Morse* v. *Boston,* 253 Mass. 247, 252, 148 N. E. 813, 815 (1925), we would conclude that a legislative judgment that these statutes are both reasonable and necessary is itself a reasonable judgment.

We do not believe that *United States Trust* requires the federal courts to go further to reexamine *de novo* all the factors underlying the legislation and to make a totally independent determination about whether a fare increase or some other alternative would have constituted a "better" statutory solution. It is true that language in *United State Trust* suggests moderately close court scrutiny of legislation that conflicts with prior *public* contracts. To be specific, the Court stated that as to *private* contracts, "in reviewing economic and social regulation . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure. . . ." 431 U. S. at 22, 23. But, as to *public* contracts, "complete deference to a legislative assessment of reasonableness and necessity is not appropriate. . . ." 431 U. S. at 26. This language itself, however, refers only to the need to avoid "complete" deference, and it is to be contrasted with the dissent's claim that in Contract Clause cases there should be "unusual" deference to the lawmaking authority of state governments. 431 U. S. at 46 (Brennan, J., dissenting). The very existence, and nature, of the complex factual controversies revealed in the record before us here support the legislature's judgment even without "complete" deference.

More importantly, *United States Trust* limits its stricter "review" approach to state laws in the "financial" area—laws which impair a state's "financial obligations." Indeed, it characterized the promise before it as "purely financial." 431 U. S. at 25. And, it specifically distinguished "as a threshold matter" state actions in other areas which might "fall within the reserved powers that cannot be contracted away." 431 U. S. at 24-25. In interpreting this language, we note that the *United States Trust* facts presented a paradigm of the type of protection that the Contract Clause was designed to offer—a protection given to those who in-vested money, time and effort against loss of their investment through explicit repudiation. *See* B. Wright, *The Contract Clause of the Constitution* 15-16 (1938); Hale, *The Supreme Court and the Contract Clause,* 57 Harv. L. Rev. 512 (1944). Unlike that case, there is no evidence here of any unreasonable effort to impose the costs or burdens of a new legislative policy upon a small group of previous investors, by, for example, depriving them of their investment. There is no reason to examine these provisions under the strict standard applied when rights specifically protected by the Bill of Rights or minority rights protected by the fourteenth amendment are at stake. *See Dandridge* v. *Williams,* 397 U. S. 471, 484 (1970).

Finally, it would be unusually difficult for a federal court to conduct a trial and determine *de novo* the reasonableness and necessity of each detailed provision of these statutes. The difficulties are well illustrated by the affidavits that the parties have submitted. The MBTA, for example, claims that salaries of MBTA workers in every job category are significantly higher than those of Massachusetts state and municipal workers doing comparable work (*e.g.,* MBTA clerk/typists and janitors earn 92 percent more than comparable state employees; machinists earn 84 percent more than comparable state employees; in 1979, two carshifters, one surface operator, one trackman, and one portable compressor operator each earned over $40,000, of which over $20,000 was overtime pay); that the average MBTA employee earns 79 percent more than the average manufacturing industry worker in Massachusetts; that the MBTA's cost per mile is 83 percent higher than the next most inefficient system; that the MBTA lacks flexibility to adjust job assignments or reclassify employees to meet changing needs; that "featherbedding" is rampant; that the MBTA is required to pay overtime rates to an employee during any day he works more than eight hours, even if he does not work more than forty hours that week; that restrictive work rules require the MBTA to hire full-time people for part-time jobs; and that the MBTA is unable unilaterally to subcontract out work. The MBTA also claims that its efforts to deal with these problems through the established collective bargaining arbitration procedures have proven unsuccessful; and, according to a former chairman, changes in work practices could obviate the need for a fare increase.

The Transit Union strongly denies these allegations. Its affidavits set forth contrary claims. It claims, for example, that the MBTA has not been unsuccessful under existing interest arbitration; that the MBTA has failed to use the bargaining and arbitration processes properly to deal with its problems, that the financial dependence by the MBTA upon tax revenues is largely a result of inadequate farebox revenues; that union work practices are not inflexible; that the MBTA work force is efficient; that the MBTA has been able to subcontract out work; and that the MBTA enjoys above average productivity from its workers.

The district court was able to make a few findings about work rules insofar as the parties could agree about the facts.[57] But to go further and resolve disagreements,

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[57] In its supplementary memorandum of May 15, 1981, the district court stated:

> . . . There appears to be no dispute . . . about the existence of the following work rules for whatever significance they may have:
>
> a. Management may not make temporary reassignments of employees to jobs at locations different from their regular assignment.
>
> b. Employees may not be temporarily reclassified to meet unexpected needs.

(Footnote continued on following page)

the court might well have to pass judgment upon such matters as a proper rate of pay, the way differently constituted arbitration tribunals are likely to function, the ease, as a political matter, of raising taxes or fares, the likely social and economic effects of a fare increase, the pressures (social and economic) that could lead to serious labor unrest, and so on. Answering these sorts of questions, and thereby determining the "reasonableness and necessity" of a particular statute, is a task far better suited

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(Footnote continued from preceding page)

c. Rapid transit vehicles within a storage yard must be moved by a yard motorman and may not be moved by the regular operators of the vehicles even if there are not enough yard motormen on duty at a particular time. The yard motormen do not do any other work.

d. Employees may not be assigned to two "details".

e. Overtime is paid on the basis of an eight-hour day rather than a 40-hour week, and in any case must first be offered to senior employees on a system-wide basis. An employee may receive overtime without having worked a full 40-hour week.

f. There is system-wide bidding for jobs on the basis of seniority.

g. Motormen must be assigned to rail maintenance vehicles, but do not operate the vehicle or participate in maintenance.

h. Schedules once assigned may not be changed to meet shifting rider demands, except on a three-month basis.

i. Penalties must be paid to drivers on split runs if the break exceeds two hours. MBTA pays $2.6 million per year in such penalties.

j. There are restrictions on the hiring of part-time drivers.

I make no findings with respect to the effect of the foregoing work rules, or the justification for them, concerning which I have not heard evidence or argument. Furthermore, I express no opinion as to the relevance of any of the above work rules to any issue before me or before the Court of Appeals.

to legislators than to judges. Thus, in the case before us, where economic or social legislation is at issue, some deference to the legislature's judgment is surely called for.

In sum, given the small amount of reliance that the Transit Union could reasonably have placed upon the perpetual continuation of the Basic Agreement, the importance of preserving the state's power to legislate in this area, the apparent reasonableness and necessity of the legislation, and the state's efforts to apply the statutes prospectively, thereby minimizing their interference with the parties' reasonable expectations, we hold that Chapters 405 and 581 do not violate the Contract Clause even if, as a matter of state law, the Basic Agreement is still in effect.

IV

We now turn to the different claim of the other appellee in this case, Lodge 264 of District 38, International Association of Machinists and Aerospace Workers (the "Machinists"). On July 1, 1976, the Machinists and the MBTA entered into their most recent collective bargaining agreement. Article II provided:

> The term of this Agreement shall commence as of January 1, 1976, and shall extend to and include December 31, 1977, and from year to year thereafter, unless either party shall give to the other party a notice . . . of a desire to change or terminate this Agreement.
>
> After receipt of such notice, the Agreement shall be opened up and the change or changes desired by either or both parties shall be considered.

Article XIV(A) provided:

> No Layoff—No employee, in any classification under the jurisdiction of the Association [the Machinists'

> Union], shall be laid off during the term of this Agreement.

On October 19, 1977, Charles E. Deignan, Business Representative of the Machinists, wrote the MBTA, stating "Notification is given that the undersigned hereby wishes to re-open the Agreement . . . ." On October 26, 1977, Robert R. Kiley, Chairman of the MBTA, wrote to Mr. Deignan that "the Authority hereby gives notice that it desires to make changes in the aforesaid Articles of Agreement, as amended." In the following months, the MBTA and the Machinists apparently negotiated, but they reached an impasse in July 1980. Though the Agreement also provided for interest arbitration, they could not agree, in light of Chapters 405 and 581, what form that arbitration should take.

Until March 2, 1981, the MBTA was prevented from making significant changes in the status quo by the state court injunction referred to at page 15 note 21, and page 41 *supra.* On March 3, 1981, however, the MBTA notified the Machinists that it intended to lay off fifty-three employees represented by that union, effective March 21, 1981.

The Machinists then intervened as a plaintiff in this action initiated by the Transit Union. The Machinists claimed protection under the 1974 § 13(c) agreement.[58]

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[58] The BMTA contends that while the International Association of Machinists and Aerospace Workers signed the § 13(c) agreement, it did so in its capacity as an organization representing Boston and Maine Railroad employees, not MBTA employees. (Affidavit of Paul J. Murphy, April 29, 1981). In November 1980, the attorney for the Machinists was informed of the MBTA's position that since Lodge 264 was not a signatory to the existing § 13(c) agreement, it could not invoke the protections of that agreement. This issue has not been briefed by any of the parties, and it is not necessary that we decide the matter here.

They joined the Transit Union in its Supremacy Clause and Contract Clause contentions. And they claimed that, in any event, as a matter of state law, their collective bargaining contract was still in effect and Article XIV of that contract prohibited layoffs.

The district court enjoined the layoff of the Machinists on the basis of state law. It reasoned that the Machinists' contract had, in fact, expired on December 31, 1977, and that the exchange of notices given in October 1977 had operated under the terms of the contract "to cut off the 'year to year' extended term." 511 F. Supp. at 316. However, because it appeared from an "uncontradicted affidavit" submitted by the Machinists that "the parties have treated the agreement as continuing in force up to this time, and have mutually enforced its terms as from time to time amended," 511 F. Supp. at 316-317, the district court ruled that "the MBTA is estopped to deny the continuation in force of the agreement dated January 1, 1976. . . ." *Id.* at 317. The court further stated:

> The proposed layoffs of members of the Machinists' Union is in direct violation of the explicit terms of the collective bargaining agreement, and while they may be justified they are properly the subject of arbitration under the existing agreement before they are effectuated. Such arbitration would not be interest arbitration subject to ch. 405 of the Act of 1978.

Id. at 320.

The MBTA appeals this ruling. It argues that it was inappropriate for the district court to invoke the doctrine of equitable estoppel. *See Celluci* v. *Sun Oil Co.,* 2 Mass. App. Ct. 722, 320 N. E. 919, 923, *aff'd* 368 Mass. 811, 331 N. E. 2d 813 (1974). The Machinists disagree. They add that the district court, in any event, should have found that the collective bargaining agreement did not terminate in 1977, that it was only "opened" for changes, and that its terms therefore continue to apply.

We are reluctant to conclude that at the time of its ruling the district court abused its discretion in issuing a preliminary "layoff" injunction. *See Nat. Tank Truck Carriers, Inc.* v. *Burke,* 608 F. 2d 819, 823 (1st Cir. 1979). Yet, we note that the questions presented here are now entirely matters of state law. They are closely related to matters which have been, and may still be, subject to adjudication in the state courts. *See Gallahue* v. *MBTA, supra.* Moreover, the district court made its equitable estoppel ruling on the basis of what it described as an "uncontradicted affidavit" submitted by the Machinists that "the parties have treated the agreement as continuing in force. . . ." 511 F. Supp. at 316-317. In its brief and in various opposition papers, the MBTA appears to dispute this assumption, thus undercutting a premise fundamental to the district court's reasoning. Also, given our holding here, it now seems unlikely that the Machinists can pursue any related federal claim. In addition, the district court wrote on March 17 that the injunction delaying the layoffs pending grievance arbitration was to remain in effect only for a "reasonable time pending the prompt completion of arbitration." 511 F. Supp. at 321. Under these circumstances, we believe it appropriate for the district court to reconsider the propriety of the injunction in light of present circumstances.

V

The decision to grant or deny preliminary injunctive relief ordinarily lies within the sound discretion of the trial court. *Grimard* v. *Carlston,* 567 F. 2d 1171, 1173 (1st Cir. 1979). We will not lightly overturn that judgment. *Maceira* v. *Pagan,* 649 F. 2d 8, 15 (1st Cir. 1981) (*see* cases cited therein). However, the "application of an improper legal standard" or the "misapplication of an improper legal standard" or the "misapplication of the law to particular facts" provides a basis for reversal. *Planned Parenthood League of Mass.* v. *Bellotti,* 641 F. 2d 1006, 1009 (1st Cir. 1981). We have found that Chapters 405 and 581 are constitutionally sound. For this reason, the Transit Union has failed to demonstrate likelihood of success on the merits, a prerequisite to the granting of preliminary injunctive relief. *Id.* at 1009.

Accordingly, to the extent that it is inconsistent with this opinion, the district court's order of March 17, 1981, as clarified on May 15, 1981, is vacated and the case is remanded for further proceedings consistent with this opinion.

No. 78-1185

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LOCAL DIVISION 1285, AMALGAMATED TRANSIT
UNION, AFL/CIO/CLC, - - - *Plaintiff-Appellant,*

v.

JACKSON TRANSIT AUTHORITY and the CITY
OF JACKSON;
WILLIAM T. COLEMAN, JR. and WILLIAM J.
USERY, in their official capacities, - *Defendants-Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

Argued June 5, 1980
Decided June 3, 1981

OPINION

Labor organization representing city transit employees brought suit against city and its transit authority as well as Secretary of Labor and Secretary of Transportation claiming that city and authority abrogated collective bargaining agreement required in connection with grant under Urban Mass Transportation Act and that federal officials failed to exercise their statutory duty to prevent such alleged wrongful action. The United States District Court for the Western District of Tennessee, 447 F. Supp. 88, Harry W. Wellford, J., dismissed complaint for lack of federal jurisdiction, and plaintiff appealed. The Court of Appeals, Boyce F. Martin, Jr., Circuit Judge, held that:

(1) union's claim "arose under" federal law and gave rise to federal jurisdiction; (2) union had private federal remedy under the Act; and (3) Secretaries of Labor and Transportation did not have statutory duty to enforce terms of "labor protective arrangement" executed pursuant to Urban Mass Transportation Act, as would support union's claim for relief in nature of mandamus against Secretaries.

Reversed and remanded with instructions.

Merritt, Circuit Judge, dissented and filed opinion.

1. Federal Courts—Key 242

If claim "arises under" laws of the United States, then federal jurisdiction obtains unless claim is immaterial or wholly insubstantial and frivolous, made solely for purpose of obtaining jurisdiction. 28 U.S.C.A. § 1331.

2. Federal Courts—Key 191

For purposes of federal jurisdiction, an "action" is defined in terms of right asserted, not remedy sought.

3. Federal Courts—Key 242

Federal right asserted as basis of federal jurisdiction must be essential element of plaintiff's cause of action. 28 U.S.C.A. § 1331.

4. Federal Courts—Key 245

Union's claim that city breached collective bargaining agreement required in connection with grant under Urban Mass Transportation Act arose under laws of the United States, was neither insubstantial nor frivolous, and involved more than $10,000, and therefore, gave rise to federal jurisdiction. Urban Mass Transportation Assistance Act of 1970, § 13(c), 49 U.S.C.A. § 1609(c); 28 U.S.C.A. § 1331.

5. Statutes—Key 181(1)

Of factors used to determine whether statute implies cause of action, legislative intent is most significant.

6. Federal Courts—Key 201

Section of Urban Mass Transportation Act requiring, as a condition of any assistance, that fair and equitable arrangements be made to protect interests of employees affected by such assistance, creates private federal remedy for employees of local transit authorities which have received federal funds under the Act. Urban Mass Transportation Assistance Act of 1970, § 13(c), 49 U.S.C.A. § 1609(c).

7. Mandamus—Key 73(1)

Secretaries of Labor and Transportation did not have statutory duty to enforce terms of "labor protective arrangement" executed pursuant to Urban Mass Transportation Act, as would support union's claim for relief in nature of mandamus against Secretaries. Urban Mass Transportation Assistance Act of 1970, §§ 3(e, f, g), 13(c), 49 U.S.C.A. §§ 1602(e, f, g), 1609(c).

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Before Merritt, Kennedy and Boyce F. Martin, Jr., Circuit Judges.

Boyce F. Martin, Jr., Circuit Judge.

This appeal requires us to decide whether Section 13(c) of the Urban Mass Transportation Act, 49 U.S.C. § 1601 *et seq.*, ("UMTA") creates a private federal cause of action for employees of local transit authorities which have received federal funds under the Act. We must also determine whether either the Secretary of Labor or the Secretary of Transportation has a statutory duty to enforce the terms of a "labor protective arrangement" executed pursuant to Section 13(c) of the Act. 49 U.S.C. § 1609(c).

In 1966, the City of Jackson, Tennessee applied for a federal grant to facilitate conversion of a failing private bus company into a public transit authority. As a condition of federal funding, Section 13(c) requires grant recipients to make "arrangements" for the protection of their employees' interests:

> It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to

> their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.

In order to qualify for a grant, Jackson Transit Authority entered into a "Section 13(c) agreement" with Local Division 1285, Amalgamated Transit Union, the collective bargaining agent for the transit employees. That agreement was duly submitted to the Secretary of Labor, who certified that it met the "fair and equitable" standard of Section 13(c). In accordance with Section 13(c)(5), the substance of this "arrangement" was incorporated in the grant contract between Jackson and the United States.

From 1966 until 1975, Jackson and the Union negotiated and honored a series of collective bargaining agreements. In 1975, however, Jackson allegedly repudiated its current collective bargaining contract and unilaterally reduced certain employee benefits. The Union, through its International president, sought determinations by the Secretaries of Labor and Transportation that Jackson had breached its obligation under Section 13(c) to continue collective bargaining. Both Secretaries refused to issue such a finding, whereupon the Union initiated this action.

In its complaint, the Union sought: 1) monetary and injunctive relief against Jackson; and 2) mandamus relief against the Secretaries. Jackson moved for dismissal on jurisdictional grounds; the Secretaries also moved for dismissal, or in the alternative, for summary judgment.

The District Court heard oral argument on the defendants' motions. On December 22, 1977, the court issued an order and memorandum opinion dismissing the complaint for lack of federal jurisdiction. That decision is reported at 447 F. Supp. 88.

On appeal, the Union argues that the court should have exercised jurisdiction over the controversy and inferred a private federal right of action against the transit authority from Section 13(c) of the Act. We agree. We reject, however, the Union's further claim for relief in the nature of mandamus against the Secretaries of Labor and Transportation.

I. The Complaint against Jackson.

A. Federal Jurisdiction.

The District Court dismissed the case for lack of federal jurisdiction. We disagree both with the court's analysis and its conclusion. The opinion below proceeds on the assumption that subject matter jurisdiction under 28 U.S.C. § 1331 is contingent upon the availability of a private federal remedy under Section 13(c). That approach is inconsistent with the analysis required by the Supreme Court in *Bell* v. *Hood,* 327 U. S. 678 (1946).

Bell v. *Hood* emphasized the distinction between the threshold ascertainment of "arising under" jurisdiction and the question whether the plaintiff in a given case has stated a claim upon which relief can be granted:

> Jurisdiction, therefore, is not defeated . . . by the possibility that the averments (of the complaint) might fail to state a cause of action upon which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action upon which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. 327 U. S. at 682.

Our first determination, therefore, must be whether the Union's claim "arises under" the laws of the United States within the meaning of Section 1331. If it does, then federal jurisdiction obtains unless the claim is "immaterial," or "wholly insubstantial and frivolous," made "solely for the purpose of obtaining jurisdiction," *Id.* at 682. Section 1331 also requires a minimum amount in controversy of $10,000.00.

It is axiomatic that for purposes of federal jurisdiction an "action" is defined in terms of the *right asserted,* not the remedy sought. *Cohens* v. *Virginia,* 6 Wheat. 264, 379 (1821). Furthermore, the federal right asserted must be an *essential* element of the plaintiff's cause of action. *Gully* v. *First National Bank,* 299 U. S. 109, 112 (1936); *Phillips Petroleum Co.* v. *Texaco, Inc.,* 415 U. S. 125, 127 (1974).

In the instant case, the Union contends that Jackson, by disavowing an existing collective bargaining contract and by taking subsequent unilateral actions, has jeopardized a right guaranteed to transit employees by a federal statute.

Jackson, on the other hand, emphasizes the "private" nature of the Section 13(c) contract and advances the District Court's conclusion that the Union's complaint is "essentially a state breach of contract claim." In support of this position it cites *McFaddin Express, Inc.* v. *Adley Corp.,* 346 F. 2d 424 (1965), in which the Second Circuit declared itself without jurisdiction to enforce a temporary management contract between two regulated interstate carriers. The plantiff in *McFaddin* brought an action in federal court for breach of that contract, relying for jurisdiction on an Interstate Commerce Commission order which "authorized" one carrier to manage the other for a period of six months. The court based its finding of no jurisdiction on: 1) the permissive rather than mandatory nature of the I.C.C. order; and 2) the absence of any "national interest" in the contract such that "federal principles (would) control the disposition of the case." However, we will demonstrate that neither ground of the *McFaddin* holding applies here.

Jackson's assertion that the United States is not a party to the Section 13(c) agreement is correct but irrelevant; the decisive factor is that the agreement is so intertwined with the federal statutory scheme that the rights it secures cannot be dismissed as "merely private." Not only does the statute require applicants to execute labor protective arrangements, but it also specifies a number of provisions those arrangements must include. One such mandatory provision is a guarantee that transit employees will enjoy continued collective bargaining rights after their private employer becomes a public authority. Moreover, the relationship of the Section 13(c) agreement with the federal scheme does not end with the negotiations of an "arrangement" between two private parties. On the contrary, Section 13(c) specifically states that no federal funds will be made available until the Secretary of Labor certifies that the agreement is "fair and equitable." Furthermore, the terms of the Section 13(c) agreement must appear in the grant contract between the United States and the grant recipient.

Thus, in contrast to the contract in *McFaddin,* the Section 13(c) agreement is a mandatory means of preserving rights created by a federal statute. That Congress chose a "private" arrangement as the vehicle for protecting transit employees does not negate the fundamentally "federal" character of the rights it perpetuates. Inasmuch as the "right asserted" in this case derives from a federal statute, we can only conclude that the Union's claim "arises under" the laws of the United States. Similarly, this action is neither "insubstantial" nor "frivolous" within the meaning of *Bell* v. *Hood, supra.*

Because Jackson does not suggest that the Union's claim involves less than $10,000.00, we shall deal summarily with the question of the amount in controversy. The Union plainly meets the standard established in *Saint Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283, 288 (1938):

> [U]nless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.

In light of these determinations, we hold that the District Court erred in dismissing this case for lack of federal jurisdiction. Our conclusion finds support in three Circuit Court decisions in actions nearly identical to this one. *Local Division No. 714* v. *Greater Portland Transit District*, 589 F. 2d 1 (1st Cir. 1978); *Local Division 519, Amalgamated Transit Union* v. *LaCrosse Municipal Transit Utility*, 585 F. 2d 1340 (7th Cir. 1978); *Division 1287, Amalgamated Transit Union* v. *Kansas City Area Transportation Authority*, 582 F. 2d 444 (8th Cir. 1978), *cert. denied*, 99 S. Ct. 872 (1979). Each of those cases dealt with alleged breaches of Section 13(c) agreements by grant recipients. In each instance, the Court of Appeals upheld federal jurisdiction. We can discern only one significant distinction between these cases and the dispute before us. To the extent that this distinction has any effect at all, it strengthens the argument in favor of federal jurisdiction here. In every previous case, the plaintiff Union sought federal court enforcement of interest arbitration provisions contained in a Section 13(c) agreement. Unike continued collective bargaining rights, interest arbitration is not explicitly required by the statute. Thus, for the other courts, whether or not the right to interest arbitration "arose under" federal law was a closer question that is our analogous inquiry into the source of continued collective bargaining rights.

International Assoc. of Machinists v. *Central Airlines, Inc.*, 372 U. S. 682 (1963), a leading Supreme Court case on federal question jurisdiction, lends further support to our conclusion. *Central Airlines* arose from Section 204 of the Railway Labor Act, 45 U.S.C. § 184, which requires airlines and their employees' unions to establish, by private contract, airline boards of adjustment. The board of adjustment to which Central Airlines was subject was empowered by the contracting parties to resolve certain labor disputes and to make final and binding awards. Central refused to comply with one such award and the employees' union sought enforcement in federal court. The Supreme Court held that the action to enforce the award "arose under" federal law and gave rise to federal question jurisdiction:

> The contracts and the adjustment boards for which they provide are creations of federal law and bound to the statute and its policy. If any provision contained in a § 204 contract is enforceable, it is because of congressional sanction: "[T]he federal statute is the source of the power and authority. . . . The enactment of the federal statute . . . is the governmental action . . . though it takes a private agreement to invoke the federal sanction . . . A union agreement made pursuant to the Railway Labor Act has, therefore, the imprimatur of the federal law upon it . . . That is, the § 204 contract, like the Labor Management Relations Act § 301 contract, is a federal contract and is therefore governed and enforceable by federal law, in the federal courts. 327 U. S. at 692. (citation omitted.)

Jackson attempts to distinguish *Central Airlines* by noting that the Supreme Court's decision was informed by the "national interest" in preserving stable labor relations in the airline industry. That argument, however, does little to advance Jackson's cause. First, the legislative history of UMTA reveals a similar policy behind the enactment of Section 13(c). *See* 109 *Cong. Rec.* 5670. Second, as Judge Doyle stated: the "purpose (of the Railway Labor Act) in no way controls the explicit and limited decision regarding federal subject matter jurisdiction." *Local Division 519* v. *LaCrosse Municipal Trans., supra,* at 807.

B. The Implied Cause of Action.

We turn now to discuss whether the Union has a private federal remedy under Section 13(c). The statute itself is silent on the question. We must therefore decide whether such a remedy arises by implication.

The Seventh Circuit had no difficulty resolving this issue:

> We agree with Judge Doyle's statement: "Congress intended that the contracts embodying the 'fair and equitable arrangements' were to be enforceable contracts. It would be fatuous to suggest otherwise. Because the contracts were to be enforceable, it follows that they were to be enforced at the instance of the parties to the contracts." 445 F. Supp. at 811.
>
> Based upon this premise, it follows that since the test for federal question jurisdiction has been met the remedy lies in federal court. The statutory scheme outlined in the Urban Mass Transportation Act and the policy underlying § 13(c) of the Act implies a federal private remedy. Support for this holding is found in *Central Airlines.* There the Court implicitly recog-

> nized the existence of a federal private remedy. 585 F. 2d at 1349-50.

The court went on to state that an analysis under *Cort* v. *Ash*, 422 U. S. 66 (1975) is "unnecessary." *Id.* at 1350.

Whether necessary or not to this decision, an inquiry similar to that in *Cort* reinforces our conclusion that this action is properly in federal court. *See Chartwell Communications Group* v. *Westbrook*, No. 80-1566 (6th Cir. filed December 29, 1980); *Curran, et al.* v. *Merrill Lynch, Pierce, Fenner and Smith*, 662 F. 2d 216 (6th Cir. 1980). *Cort* identified four characteristics of an implied cause of action:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," *Texas & Pacific R. Co.* v. *Rigsby*, 241 U. S. 33, 39 (1916) (emphasis supplied)—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? See, *e.g., National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers*, 414 U. S. 453, 458, 460 (1974) (Amtrak). Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? See, *e.g., Amtrak, supra; Securities Investor Protection Corp.* v. *Barbour*, 421 U. S. 412, 423 (1975); *Calhoon* v. *Harvey*, 379 U. S. 134 (1964). And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? See *Wheeldin* v. *Wheeler*, 373 U. S. 647, 652 (1963); cf. *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 434 (1964); *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 394-395 (1971); *id.*, at 400 (Harlan, J., concurring in judgment). 422 U. S. at 78.

Of these four factors, legislative intent is the most significant. *Touche Ross* v. *Redington*, 422 U. S. 560 (1979); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11, 62 L. Ed. 2d 146 (1979); *Taylor* v. *Brighton Corp.*, 616 F. 2d 256 (6th Cir. 1980).

Section 13(c) clearly satisfies the first *Cort* test. That provision was enacted for the "especial" benefit of transit employees and, as we have already held, creates federal rights on their behalves.

The Union's argument is further substantiated when we apply the second and third *Cort* criteria—legislative intent, "explicit or implicit," and consistency with the overall statutory scheme. The legislative history of Section 13(c) is simply not explicit. Our review of the Congressional debates establishes that the precise means of enforcing Section 13(c) agreements was not discussed. However, as Judge Doyle remarked:

> Of course, the best key to construction of § 13(c), so obvious in my view as to be dispositive of the issue, is that § 13(c) clearly contemplates contracts as the vehicles embodying the "fair and equitable" arrangements"; that contracts are meant to be enforceable, not unenforceable; and that enforceability means the existence of some remedy in some forum. 445 F. Supp. at 817.

The Act offers no administrative solution to the problem of enforcing Section 13(c) agreements. By contrast, the implementation of certain other provisions of the statute is specifically delegated to the Department of Transportation. Unless we impute to the Secretary of Transportation the responsibility for handling labor relations disputes—an incongruous result which we decline to reach without a clear Congressional directive—we are left, if only by default, with an implied private cause of action. *See Lloyd*

v. *Regional Transportation Authority,* 548 F. 2d 1277 (7th Cir. 1977). We do note, however, that if the Act had provided any administrative mechanism under Section 13(c), our resolution of this issue might have been altogether different. *Transamerica Mortgage Advisors, Inc.* v. *Lewis, supra; Taylor* v. *Brighton Corp., supra; Bradford School Bus Transit, Inc.* v. *Chicago Transit Authority,* 537 F. 2d 943 (7th Cir. 1976).

The only question remaining is whether proceedings to enforce Section 13(c) agreements must be relegated to state court, as the District Judge held, or whether Congress intended to permit plaintiffs to sue in federal court. Jackson invokes the fourth *Cort* test, asserting that municipal employee labor relations are "traditionally" the province of state law.

In this context, it is important to remember that Jackson's transit employees were covered by the National Labor Relations Act while the employer was a private bus company. When, however, the employer became a municipal agency, N.L.R.A. coverage ended. 29 U.S.C. § 152(2). Congress was well aware of the potential problems this transition could create, and enacted Section 13(c) to ensure that federal funds would not be used to deprive transit employees of certain benefits they had long enjoyed:

> The principle of protecting workers affected as a result of adjustments in an industry carried out under the aegis of Federal law is not new, particularly in the transportation industry. Thus, railroad employees for years have enjoyed Federal protection against adverse effects attendant upon railroad consolidations. The problems of worker protection presented by the bill are not necessarily identical to those presented under other laws. The committee believes, however, that workers for whom a standard of benefits has

> already been established under other laws should receive equally favorable treatment under the proposed new program. The committee also believes that all workers adversely affected by adjustments under the bill should be fully protected in a fair and equitable manner, and that Federal funds should not be used in a manner that is directly or indirectly detrimental to legitimate interests and rights of such workers. U.S. Code of Congressional and Administrative News 1964, Vol. 2 at 2584.

It is indisputable that Section 13(c) reflects *national* labor policy. *See* 109 *Cong. Rec.* 5670. Indeed, the legislative history reveals that several senators were concerned about possible conflicts between Section 13(c) and state law, particularly in the area of the right to strike. *Id.* at 5672-73. Senator Morse, the chief sponsor of the bill which became Section 13(c), assured his colleagues that state laws forbidding public employee strikes would supersede national labor policy, but *only* where the right to strike was concerned; *all other* collective bargaining rights would be protected. *Id.* at 5671-73. Senator Morse made the following comments on the bill:

> It is impossible to satisfy all Senators. The reason why it is impossible to satisfy them all is that we cannot satisfy each instance and protect the Federal policy, because some changes are going to have to be made in some of the States to conform to the Federal policy.
>
> I do not think there would be any great wrong done if we simply said to a State "You do not qualify for this Federal grant." It does not mean they are entitled, as a matter of right, to the Federal grants irrespective of the fact that they are not following a policy that is in conformity with a Federal policy . . . . *Id.* at 5675.

Jackson points out, correctly, that Section 13(c) was designed to encourage flexibility in formulating labor protective "arrangements." Senator Morse himself suggested that if local law prohibits collective bargaining by municipal employees, alternative solutions such as entrusting management of the transit authority to a private commission which *could* legally bargain with the union might be explored. *See also* Department of Labor Guidelines, 43 F.R. 13558 (3-31-78). The point, of course, is not that Congress was willing to make allowances for local problems. Rather, the point is that to qualify for federal funds, municipalities *must*, one way or another, undertake to protect the collective bargaining rights required by national labor policy.

In summary, the rights Section 13(c) preserves are federal rights. In *Transamerica Mortgage Advisors, Inc.* v. *Lewis, supra,* the Supreme Court found that Section 215 of the Investment Advisors Act creates a limited private right of action. In determining the appropriate forum for such an action, the Court observed:

> One possibility, of course, is that Congress intended that claims under § 215 would be raised only in state court. But we decline to adopt such an anomalous construction without some indication that Congress in fact wished to remit the litigation of a federal right to the state courts. 444 U. S. at 20, n. 8.

Applying that approach to the present case, we hold that the Union is entitled to pursue its claim in federal court.

In reaching this decision, we note a recent tendency on the part of the Supreme Court to limit the inference of private actions from federal statutes. In *Touche Ross* v. *Redington, supra,* Justice Rehnquist was explicit on this point:

> To the extent our analysis in today's decision differs from that of the Court in *Borak,* [*J. I. Case Co.* v. *Borak,* 377 U. S. 426 (1964)], it suffices to say that in a series of cases since *Borak* we have adhered to a stricter standard for the implication of private causes of action, and we follow that stricter standard today . . . The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve on the statutory scheme that Congress enacted into law. 442 U. S. at 578. (citation omitted.) *See also Transamerica Mortgage Advisors, Inc.* v. *Lewis, supra.*

A careful reading of those cases, however, persuades us that neither *Touche Ross* nor *Transamerica* requires a different result here.

In *Touche Ross,* the Court declined to infer a private right of action from Section 17(a) of the Securities Exchange Act of 1934, which requires broker-dealers to maintain certain records and file certain reports with the SEC. The Court emphasized that Section 17(a) neither grants private rights to the members of an identifiable class, nor prohibits specific conduct. 442 U. S. at 569. Here, by contrast, we have already found that Section 13(c) of the Act does confer federal rights on transit employees, including the right to continued collective bargaining.

Transamerica involved not only Section 215 of the Investment Advisors Act, noted above, but Section 206 of that statute as well. The Court held that Section 206 does not imply a private cause of action. Unlike the statute in *Touche Ross,* Section 206 does explicitly prohibit investment advisors from engaging in certain fraudulent practices. Concededly, it was enacted for the protection of investment advisors' clients. However, the Court makes clear that the dispositive issues in *Transamerica* were the overall statutory scheme, which includes no fewer than three enforcement provisions yet omits any reference to private suits, and the legislative history, which strongly suggests that Congress did *not* intend to imply a private right of action. No such benchmarks appear in the present case. We have found nothing in the Act or its history which indicates that Congress intended to deny transit employees an opportunity to enforce their federal rights in federal court.

II. The Union's Claim against the Secretaries of Labor and Transportation.

We begin our discussion of this final issue by pointing out that the threshold inquiry is whether either Secretary has a statutory duty to enforce Section 13(c) agreements on behalf of transit employees. If no such duty exists, our analysis need go no further.

The Act makes only two references to the role of the Secretary of Labor. Sections 3(e)[1] and 13(c) require the Secretary, as part of the grant approval process, to certify that labor protective arrangements are "fair and equitable." Neither section intimates that the Secretary is expected to supervise the conduct of the parties after an acceptable agreement is reached and the grant disbursed. According to the Union, however, "it stands to reason" that the Secretary should also bear continuing responsibility for enforcing the terms of Section 13(c) agreements. Whether or not we agree with the policy behind the Union's position, we decline to substitute our judgment on the issue for that of Congress.

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[1] Section 3(e) of the Act (49 U.S.C. 1602(e) provides in pertinent part:

> No financial assistance shall be provided under this chapter to any State or local public body . . . unless . . . (4) the Secretary of Labor certifies that such assistance complies with section 1609(c) [Section 13(c)] of this title.

The legislative history affords the Union no more support than does the statute itself. In the course of the Senate and House Hearings on the bill, then-Secretary of Labor Wirtz referred to the "administration" of Section 13(c). On each occasion, however, his remarks were made in the context of formulating guidelines for "fair and equitable" arrangements. Senate Hearings on S.6, 88th Congress, 1st Sess. at p. 309. *See also* S.Rep. #82, 88th Cong., 1st Sess. 28; H.R.Rep. #204, 88th Cong., 1st Sess. 16.

Unlike the Secretary of Labor, the Secretary of Transportation does have several specific enforcement obligations under the Act. Section 3(f), 49 U.S.C. § 1602(f), for example, explicitly requires him to supervise *and* enforce protective arrangements which ensure that federal grants will not be used to force private charter bus operators out of the competitive market. Similarly, Section 3(g), 49 U.S.C. § 1602(g) requires an agreement by grant recipients not to engage in school bus operations except under limited circumstances. Again, the Secretary of Transportation has specific enforcement duties. To administer his responsibilities in the areas of school and charter bus operations, the Secretary has promulgated extensive regulations which include provisions for judicial review of agency action in accordance with the Administrative Procedure Act. 49 C.F.R. 604.1 *et seq.;* 49 C.F.R. 605.1 *et seq. See also Bradford School Bus Transit, Inc.* v. *Chicago Transit Authority, supra.*

With respect to Section 13(c), however, we are unable to conclude that Congress has imposed mandatory enforcement duties on the Secretary of Transportation. In the first place, the only administrative official even mentioned in that section is the Secretary of Labor, whose limited role we have already discussed. It would be unreasonable to assume that Congress intended to require the Department of Transportation to resolve labor relations disputes, yet neglected to say so despite its explicit mandate under other sections of the statute. Furthermore, we have discovered nothing in the legislative history to indicate that Congress contemplated the result the Union seeks here. This statute was enacted eighteen years ago, yet nothing in the record before us suggests that the Secretary of Transportation has ever assumed responsibility for enforcing the terms of labor protective agreements. This factor alone is scarcely dispositive of the issue. However, it is not unlikely that Congress would have amended Section 13(c) had it perceived a need for active enforcement by the Department of Transportation. Indeed, Congress did respond to just such a need when it added Section 3(f), discussed above, to the Act in 1974.

We are aware that the First Circuit has indicated a belief that the Secretary of Transportation has at least discretionary authority to enforce labor protective arrangements by virtue of Section 12(e) of the Act. [49 U.S.C. § 1608(e)]. *Local Division 714* v. *Greater Portland Transit District, supra.* It stopped short of deciding that transit employees can compel the Department of Transportation to take action, although it characterized that possibility as "plausible." 589 F. 2d at 14. It is impossible to determine from *Greater Portland* whether our decision here actually conflicts with the law in the First Circuit, since that court's analysis was purely hypothetical. The Secretary of Transportation was not a party to that case, and the question of administrative enforcement of Section 13(c) was not at issue. Instead, the First Circuit offered its interpretation of the Secretary's statutory role as one of several arguments in favor of inferring a private federal cause of action on behalf of the plaintiff union.

In any event, the Union has failed to demonstrate a sufficient reason to compel the Secretary of Transportation to take action in this controversy. In the absence of a clear Congressional mandate, we decline to force the Department of Transportation to supervise labor-management relations.

The judgment of the District Court dismissing the Union's claim against Jackson is reversed and remanded for proceedings consistent with this opinion. The judgment dismissing the claim against the Secretaries for lack of jurisdiction is reversed with instructions to enter a judgment dismissing the claim for failure to state a cause of action upon which relief can be granted.

MERRITT, Circuit Judge, dissenting. The key question in this case is whether § 13(c) of the Urban Mass Transportation Act, 49 U.S.C. § 1601 *et seq.* (1976), a grant program established in 1964, creates a private federal right of action for breach of contract for employees against local municipal transit authorities receiving federal funds. Section 13(c) provides that there shall be no federal funding under the Act in the absence of "fair and equitable arrangements . . . as determined by the Secretary of Labor, to protect the interests of employees affected by" the program. The section goes on to say that "[s]uch protective arrangements shall include . . . provisions" respecting topics such as the "preservation" and "continuation" of collective bargaining rights and prevention of "a worsening" of employee rights. The section says that "[t]he contract for the granting of any such assistance shall specify the terms and conditions of the protective [employee] arrangements." 49 U.S.C. § 1609(c).

In this case the municipal transit authority allegedly decided after a collective bargaining agreement had been in effect for several months not to abide by portions of the agreement that required cost of living increases. The employees sued the city in federal court for enforcement of their contract.

Last week the Supreme Court decided another in a long line of private right of action cases. It unanimously held that § 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403, does not create a private right of action, *California* v. *Sierra Club,* 49 U.S.L.W. 4441 (Nos. 79-1252, 79-1502, April 28, 1981). Our Court had previously decided the question the other way. *Norfolk & Western Co.* v. *United States,* 641 F. 2d 1201 (6th Cir. 1980). The concurring opinion in the *Sierra Club* case by Justice Rehnquist for himself, the Chief Justice, and Justices Stewart and Powell, observes that courts of appeals are continuing to analyze the private right of action problem incorrectly and to imply too much—in "five of the last six statutory implied right of action cases" creating a new action the "analysis by the Courts of Appeals" has been wrong, 49 U.S.L.W. at 4445.

The opinion for the court in the *Sierra Club* case, written by Justice White, emphasizes that the inquiry in such cases is now fairly narrow:

> As recently emphasized, the focus of the inquiry is on whether Congress intended to create a remedy [citing recent cases]. The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide.
>
> 49 U.S.L.W. at 4444.

Although Congress intended to have the Secretaries of Labor and Transportation protect the interests of transit employees as a class, I do not see in this statute or its legislative history that Congress intended to create a new, original, federal, private right of action for breach of contract claims. The Secretary of Transportation can withhold funds, or perhaps the Secretary of Labor can take administrative steps, if they disapprove of the city's conduct toward its transit employees. The Secretary of Transportation can sue to enforce his agreement with a municipality. 49 U.S.C. § 1608(a). But there is nothing in the statute itself or the committee reports and debates that even hints that Congress contemplated that federal courts would decide what contractual rights should be preserved and what salary and fringe benefits are "fair and equitable" when a municipal transit worker is aggrieved by the action of his employer. There is a large number of bus drivers in the country, and Congress wanted them to know that it had considered their interests and authorized some administrative protection. But this does not mean that Congress intended to engraft a judicial remedy on the statute. Congress has not provided a principle or rule of decision for us to administer in such cases—other than general fairness. There is at stake no clearly enunciated national policy relating to municipal employee relations. There is no reason to think that state courts in the performance of their traditional common law role cannot decide these private breach of contract cases just as fairly and just as efficiently as federal courts.

No. 78-1255

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Division 1287, Amalgamated Transit Union,
AFL-CIO, - - - - - - - *Appellee,*

v.

Kansas City Area Transportation Authority, - - - - - - - - *Appellant.*

United States Court of Appeals, Eighth Circuit.
Submitted June 15, 1978.
Decided Aug. 21, 1978.
As Amended on Denial of Rehearing and
Rehearing En Banc Sept. 21, 1978.

OPINION

Union filed suit for declaratory and injunctive relief against transportation authority, seeking to compel the authority to engage in interest arbitration to settle the terms and conditions of a collective bargaining agreement to take the place of one that expired. The United States District Court for the Western District of Missouri, John W. Oliver, Chief Judge, entered judgment in favor of the union, and defendant appealed. The Court of Appeals, Henley, Circuit Judge, held that: (1) a controversy between a public transit agency and a labor union involving a claim of breach of an Urban Mass Transportation Act employee protection agreement is a controversy that arises under the law of the United States, as regards federal question jurisdiction; (2) language of the employee protection agreement between union and transportation authority compelled interest arbitration at the request of either party upon the expiration of a collective bargaining agreement, and (3) when a state or combination of states forms a public transit agency for the express purpose of obtaining federal money to enable it to take over the business of a private transit company, and where the agency, in order to obtain the money, enters into an Urban Mass Transportation Act agreement that calls for interest arbitration, the obligation to arbitrate is binding on the agency, regardless of general state law or policy.

Judgment affirmed.

1. Federal Courts—Key 359

In suit brought by union to compel transportation authority to engage in interest arbitration to settle the terms and conditions of collective bargaining agreement to take the place of one that expired, the district court properly found, on the question of jurisdictional amount, that the evidence was insufficient to establish "to a legal certainty" that the amount in controversy was not in excess of $10,000, exclusive of interest and costs, as to each employee of the authority, and the court also properly found that the union's financial interest in the case exceeded the jurisdictional minimum. 28 U.S.C.A. § 1331(a); Urban Mass Transportation Act of 1964, §§ 2 et seq., 13(c) as amended 49 U.S.C.A. §§ 1601 et seq., 1609(c).

2. Federal Courts—Key 242

Question of whether a particular case is one that "arises under" the Constitution or laws of the United States is entirely separate and distinct from the question of whether the plaintiff's complaint states a claim upon which relief can be granted and the question of whether there is any merit to the claim. 28 U.S.C.A. § 1331(a).

3. Federal Courts—Key 191

If a case is to be considered as one arising under federal law, the federal right relied upon for jurisdiction must be a paramount and not a collateral issue. 28 U.S.C.A. § 1331 (a).

4. Federal Courts—Key 191

In order to confer federal question jurisdiction on a district court, the federal question raised must be substantial and not plainly frivolous. 28 U.S.C.A. § 1331(a).

5. Federal Courts—Key 202

A controversy between a public transit agency and a labor union involving a claim of breach of an Urban Mass Transportation Act employee protection agreement is a controversy that arises under the law of the United States, as regards federal question jurisdiction. 28 U.S.C.A. § 1331 (a); Urban Mass Transportation Act of 1964, §§ 2 et seq., 13(c) as amended 49 U.S.C.A. §§ 1601 et seq., 1609(c).

6. Labor Relations—Key 433.1

Language of Urban Mass Transportation Act employee protection agreement between union and transportation authority compelled interest arbitration at the request of either party upon the expiration of a collective bargaining agreement. Urban Mass Transportation Act of 1964, § 13 (c) as amended 49 U.S.C.A. § 1609(c).

7. Labor Relations—Key 436

An agreement to arbitrate the terms of a future collective bargaining agreement may be enforced by the courts.

8. Labor Relations—Key 434.1

Federal policy in favor of arbitration as a means of settling labor disputes is a very strong one, and that policy would appear to be particularly applicable in the vital area of urban mass transit where strikes of workers are in the highest degree undesirable from the standpoint of the public.

9. Labor Relations—Key 432

When a state or combination of states forms a public transit agency for the express purpose of obtaining federal money to enable it to take over the business of a private transit company, and where the agency, in order to obtain the money, enters into an Urban Mass Transportation Act agreement that calls for interest arbitration, the obligation to arbitrate is binding on the agency, regardless of general state law or policy. Urban Mass Transportation Act of 1964, § 13(c) as amended 49 U.S.C.A. § 1609(c).

Howard F. Sachs, Spencer, Fane, Britt & Browne, Kansas City, Mo., for appellant; Harry L. Browne and James R. Willard, Kansas City, Mo., on the brief.

Linda R. Hirshman, Jacobs, Burns, Sugarman & Orlove, Chicago, Ill., for appellee; Earle Putnam, Gen. Counsel, Amalgamated Transit Union, Washington, D. C., on the brief.

Before Stephenson, Circuit Judge, Ingraham, Senior Circuit Judge,[*] and Henley, Circuit Judge.

Henley, Circuit Judge.

This is an action for declaratory and injunctive relief brought in the United States District Court for the Western

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[*] The Honorable Joe M. Ingraham, United States Senior Circuit Judge for the Fifth Circuit, sitting by designation.

District of Missouri (The Honorable John W. Oliver, District Judge) by Division 1287, Amalgamated Transit Union (Union) against the Kansas City Area Transportation Authority (Authority), which is a public agency that provides mass urban transportation in the general metropolitan area that includes the Cities of Kansas City, Missouri, and Kansas City, Kansas. The Authority was formed in 1967 as a result of a congressionally approved interstate compact between Missouri and Kansas and has received federal financial assistance running into many millions of dollars under the terms of the Urban Mass Transportation Act of 1964, as amended, 49 U.S.C. § 1601 *et seq.* (the Act).

The suit was filed to compel the Authority to engage in what is known as interest arbitration[1] to settle the terms and conditions of a collective bargaining agreement to take the place of one that expired on November 14, 1977.

The Union contends that it is entitled to interest arbitration by the terms of § 13(c) of the Act, 49 U.S.C. § 1609 (c), by the terms of agreements entered into between the Union and the Authority as required by § 13(c) (§ 13(c) agreements), and by the grant contracts that have been entered into between the Authority and the government from time to time since 1968 which contracts have incorporated by reference the prevailing § 13(c) agreements. The Union takes the position that the suit arises under the Act, that the amount in controversy is in excess of $10,000.00, exclusive of interest and costs, and that federal jurisdiction existed in the district court by virtue of 28 U.S.C. § 1331(a).

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[1] Interest arbitration, which is sometimes called contract arbitration or quasi-legislative arbitration, is the arbitration that may be required when an employer and the collective bargaining agent of employees come to an impasse with respect to the terms and conditions of a new collective bargaining agreement. It differs from grievance arbitration which may be required when disputes arise under an existing collective bargaining agreement.

The Authority contends that the district court lacked subject matter jurisdiction and that in any event the Union was not entitled to the relief that it sought.

The case was submitted to the district court largely on stipulations of fact. Judge Oliver filed detailed findings of fact, conclusions of law and comments. He concluded that he had jurisdiction and that the Union was entitled to prevail. An appropriate decree having been entered, this appeal followed.

I

The Union represents persons employed in certain capacities by private transit companies and public transportation agencies all over the United States. The record indicates that the Union is a strong believer in the proposition that labor disputes in the urban transportation industry should be settled by arbitration, including interest arbitration, rather than by strikes or lockouts.

As is well known, the urban mass transit industry in this country has been in a deteriorating condition for a long period of time. By 1964, and indeed earlier, Congress had concluded that many private companies would have to be taken over by public agencies, and that federal funds would have to be made available to those agencies in order to permit them to effect the take-overs. The result of that determination was the statute involved in this case.

The Act authorizes grants or loans of federal funds to state or local public authorities to enable them to acquire private transit companies. Employees of those companies will presumably become employees of the public agencies, and when it passed the Act Congress was concerned with the economic risks that such employees might incur as a result of the takeovers [sic]. Those risks might include loss of collective bargaining rights, loss of the right to strike, and loss of pension and retirement benefits. Section 13(c) of the Act is designed to protect, at least in large measure, the rights and interests of such employees from such risks.

In substance, § 13(c) provides that as a condition to a federal grant or loan the public agency applying for the same must enter into a protective agreement with the employees of the company to be taken over or with the collective bargaining agent of those employees. The agreement must be approved by the Secretary of Labor, and when approved it becomes a part of the grant contract between the agency and the government.

A § 13(c) agreement must preserve the rights of employees existing at the time of the public take-over, must preserve collective bargaining rights, and must protect employees from the worsening of their conditions of employment. The protection that must be provided against worsening of employment conditions must be at least equal to the protection that is afforded by 49 U.S.C. § 5(2)(f) to employees of rail carriers subject to the jurisdiction of the Interstate Commerce Commission who may be adversely affected by combinations or mergers of railroads.

II

For many years prior to the Authority's establishment and take-over of mass transportation in the Kansas City area, patrons of mass transportation services relied principally on Kansas City Transit Company and on nine much smaller companies.

The employees of Kansas City Transit Company (Transit) were covered by the National Labor Relations Act, and the Union was their bargaining representative. The collective bargaining agreements that were in force between the Union and Transit from time to time contained no-strike clauses and also provided a procedure whereby the parties could agree to continue bargaining after the expiration of a contract and to submit to binding arbitration any contract terms with respect to which they found themselves unable to agree.

The last of the agreements between the Union and Transit was executed on December 6, 1967 and covered an initial period between November 1, 1967 and October 31, 1968. It was automatically to be renewed from year to year thereafter unless the Union or Transit gave notice of termination not less than sixty days from the anniversary date of the contract. If a notice of termination was not given within that period or was withdrawn before the termination of the contract, a new contract was to be negotiated between the parties and terms on which they could not agree would be settled by interest arbitration.

Having been duly formed, the Authority in 1968 applied successfully to the government for a multi-million dollar grant to enable it to take over Transit and the smaller companies, to buy new busses, and to improve transit services in the Kansas City area. As required by the Act, a § 13(c) agreement was worked out between the Authority and the Union, was approved by the Secretary of Labor, and became a part of the grant contract between the Authority and the government.

The Authority took over urban transit operations in the Kansas City area in 1969, and since that time it has applied for and obtained numerous additional large grants of federal funds. In connection with the new grants new § 13(c) agreements have been entered into or it has been agreed that an existing agreement would be applicable to the new grant.

The Authority and the Union have entered into a number of collective bargaining agreements. At times the parties have not been able to agree as to the terms of a new agreement, and their disputes have been resolved by interest arbitration.

The most recent collective bargaining agreement between the Authority and the Union was executed in March, 1974 but was back-dated to November 1, 1973. The contract was to continue in force from year to year unless one of the parties gave written notice of termination not less than sixty days prior to the anniversary date of the contract.

By the fall of 1977 a number of differences between the Authority and the Union had arisen and on September 16, 1977 the Authority gave notice to the Union that the existing agreement would be terminated. The Union promptly demanded interest arbitration, and this suit was filed when the Authority refused to submit to arbitration as to the terms and conditions of a new contract.

III

We address ourselves, first, to the question of whether the district court had subject matter jurisdiction of the complaint. The position of the Authority is that this is simply a suit on a contract and does not arise under the Constitution or laws of the United States. The defendant also contends that there is an absence of the amount in controversy that is requisite in order to confer jurisdiction under 28 U.S.C. § 1331(a).

[1] As to jurisdictional amount, the district court found that the evidence was insufficient to establish "to a legal certainty" that the amount in controversy was not in excess of $10,000.00, exclusive of interest and costs, as to each employee of the Authority, and the district court also found that the Union's financial interest in the case exceeded the jurisdictional minimum. On this question it is

sufficient to say that we agree with the district court. *Hunt* v. *Washington Apple Advertising Commission,* 432 U. S. 333, 346-48, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977); *Warth* v. *Seldin,* 422 U. S. 490, 511, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975); *Gibbs* v. *Buck,* 307 U. S. 66, 72-76, 59 S. Ct. 725, 83 L. Ed. 1111 (1939); *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.,* 303 U. S. 283, 288-90, 58 S. Ct. 586, 82 L. Ed. 845 (1938); *Local Div. 519, Amalgamated Transit Union* v. *LaCrosse Municipal Transit Utility and the City of La-Crosse, Wisconsin,* 445 F. Supp. 798, 809-10 (W.D. Wis. 1978), *appeal pending. Cf. Zahn* v. *International Paper Co.,* 414 U. S. 291, 94 S. Ct. 505, 38 L. Ed. 2d 511 (1973); *Snyder* v. *Harris,* 394 U. S. 332, 89 S. Ct. 1053, 22 L. Ed. 2d 319 (1969); *Brotherhood of Railroad Trainmen* v. *Templeton,* 181 F. 2d 527 (8th Cir.), *cert. denied,* 340 U. S. 823, 71 S. Ct. 57, 95 L. Ed. 605 (1950); and *Montgomery Ward & Co.* v. *Langer,* 168 F. 2d 182 (8th Cir. 1948).

The question of whether the case is one that "arises under" the laws of the United States is a more troublesome one, and one that has not been answered as yet by any federal appellate court. The district courts are divided on the question. The majority of those courts have held that subject matter jurisdiction does not exist.[2] However,

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[2] *See Metropolitan Atlanta Rapid Transit Authority* v. *Local Division 732, Amalgamated Transit Union* (N.D. Ga. 1973); *Local Div. No. 714, Amalgamated Transit Union* v. *Greater Portland Transit District* (D. Me. 1978); *Local Div. 1285, Amalgamated Transit Union* v. *Jackson Transit Authority* (W.D. Tenn. 1977-78). Appeals are now pending in the Portland, Maine case and in the Jackson, Tennessee case.

Another case that is of interest here is *Div. 580, Amalgamated Transit Union* v. *Central New York Regional Transportation Authority,* N.D. N.Y. No. 77-CV-45. In that case the Union sought to compel interest arbitration and moved for a preliminary injunc-

(Footnote continued on following page)

in *Local Div. 519, Amalgamated Transit Union* v. *LaCrosse Municipal Transit Utility and the City of LaCrosse, Wisconsin, supra,* 445 F. Supp. at 804-09, District Judge Doyle of Wisconsin held that a case involving a claim of a breach of a § 13(c) agreement is a case that arises under the laws of the United States. As far as jurisdiction is concerned, Judge Oliver's holding in this case is expressly based on the opinion of Judge Doyle in *Local Div. 519.*[8]

(Footnote continued from preceding page)

tion; the defendant resisted that motion but did not immediately raise any jurisdictional question. The motion was denied by the district court, and the Union appealed. The action of the district court was upheld by the Court of Appeals for the Second Circuit without any cognizance being taken of a possible jurisdictional question. *Div. 580, Amalgamated Transit Union* v. *Central New York Regional Transportation Authority,* 556 F. 2d 659 (2d Cir. 1977). On remand the defendant raised the question of subject matter jurisdiction, and the district court held that jurisdiction did not exist. There was another appeal by the Union. While that appeal was pending, the Union and the Transportation Authority settled their differences and executed a new collective bargaining agreement. The court of appeals held that this development rendered the controversy moot and declined to pass on the jurisdictional question. *Div. 580, Amalgamated Transit Union* v. *Central New York Regional Transportation Authority,* 578 F. 2d 29 (2d Cir. 1978).

[8] An appeal is pending in that case. We note, however, that on February 14, 1978 a panel of the Court of Appeals for the Seventh Circuit refused to grant to the defendant utility a stay of the preliminary injunction that Judge Doyle had granted. The panel said "that the defendants-appellants must now proceed to arbitration does not constitute irreparable harm so as to justify this court in staying the preliminary injunction. That preliminary injunction was issued after careful consideration by the district court." Judge Oliver decided this case on February 28, 1978, and he mentions the Seventh Circuit's order of February 14 which had not been entered when this case was briefed in the district court.

[2] The question of whether a particular case is one that "arises under" the constitution or laws of the United States is not always an easy one to answer. 13 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE & PROCEDURE, § 3562, pp. 397-414. The question is entirely separate and distinct from the question of whether the plaintiff's complaint states a claim upon which relief can be granted and the question of whether there is any merit to the claim. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.,* 341 U. S. 246, 249, 71 S. Ct. 692, 95 L. Ed. 912 (1951); *Bell* v. *Hood,* 327 U. S. 678, 682-83, 66 S. Ct. 773, 90 L. Ed. 939 (1946); *Gully* v. *First Nat'l Bank,* 299 U. S. 109, 112-14, 57 S. Ct. 96, 81 L. Ed. 70 (1936); *Norton* v. *Blaylock,* 285 F. Supp. 659, 661-62 (E.D. Ark. 1968), *aff'd,* 409 F. 2d 772 (8th Cir. 1969).

In *Gully* v. *First Nat'l Bank, supra,* 299 U. S. at 112-13, 57 S. Ct. at 97, the Court said:

> How and when a case arises 'under the Constitution or laws of the United States' has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. *Starin* v. *New York,* 115 U. S. 248, 257, [6 S. Ct. 28, 29 L. Ed. 388]; *First National Bank* v. *Williams,* 252 U. S. 504, 512, [40 S. Ct. 372, 64 L. Ed. 690]. The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. *Ibid; King County* v. *Seattle School District,* 263 U. S. 361, 363, 364, [44 S. Ct. 127, 68 L. Ed. 339]. A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto (*New*

> *Orleans* v. *Benjamin,* 153 U. S. 411, 424, [14 S. Ct. 905, 38 L. Ed. 764]; *Defiance Water Co.* v. *Defiance,* 191 U. S. 184, 191, [24 S. Ct. 63, 48 L. Ed. 140]; *Joy* v. *St. Louis,* 201 U. S. 332, [26 S. Ct. 478, 50 L. Ed. 776]; *Denver* v. *New York Trust Co.,* 229 U. S. 123, 133 [33 S. Ct. 657, 59 L. Ed. 1101]), and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. *Tennessee* v. *Union & Planters Bank,* 152 U. S. 454, [14 S. Ct. 654, 38 L. Ed. 511]; *Louisville & Nashville R. Co.* v. *Mottley,* 211 U. S. 149, [29 S. Ct. 42, 53 L. Ed. 126]; *The Fair* v. *Kohler Die & Specialty Co.,* 228 U. S. 22, 25, 33 S. Ct. 410, 57 L. Ed. 716; *Taylor* v. *Anderson,* 234 U. S. 74, [34 S. Ct. 724, 58 L. Ed. 1218]. Indeed, the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense. *Devine* v. *Los Angeles,* 202 U. S. 313, 334, [26 S. Ct. 652, 50 L. Ed. 1046]; *The Fair* v. *Kohler Die & Specialty Co., supra.*

And the Court cited with approval the earlier case of *Shulthis* v. *McDougal,* 225 U. S. 561, 569, 32 S. Ct. 704, 706, 56 L. Ed. 1205 (1912), wherein it was said:

> A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends.

[3] More recently, this court held that if a case it to be considered as one arising under federal law, "the federal right relied upon for jurisdiction must be a paramount and

not a collateral issue." *Baker* v. *Riss & Co.*, 444 F. 2d 257, 259 (8th Cir. 1971).

[4] And, of course, in order to confer federal question jurisdiction on a district court the federal question raised must be substantial and not plainly frivolous. *Hagans* v. *Lavine*, 415 U. S. 528, 536-38, 94 S. Ct. 1372, 39 L. Ed. 2d 577 (1974); 13 WRIGHT, MILLER & COOPER, *supra*, § 3564, pp. 426-30.

We have mentioned already the purpose of the Act and the concern of Congress with respect to the economic interests of employees of private transit companies that were to be taken over by public agencies. Section 13(c) of the Act does not simply direct a public agency seeking a federal grant and a labor union representing transit employees to sit down at the bargaining table and enter into any kind of a contract that is mutually agreeable to them. As has been seen, § 13(c) prescribes at least minimum standards for employee protection, requires that the agreements in question be approved by the Secretary of Labor, and provides that the agreements become part of the contracts between the public agencies and the government itself.

[5] Although the question is not free from doubt, we now hold that a controversy between a public transit agency and a labor union involving a claim of breach of a § 13(c) agreement is a controversy that arises under the laws of the United States. *See Ass'n of Machinists* v. *Central Airlines*, 372 U. S. 682, 83 S. Ct. 956, 10 L. Ed. 2d 67 (1963); *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210, 65 S. Ct. 235, 89 L. Ed. 187 (1944); *Burlington Northern, Inc.* v. *American Railway Supervisors Ass'n*, 503 F. 2d 58 (7th Cir. 1974), *cert. denied*, 421 U. S. 975, 95 S. Ct. 1974, 44 L. Ed. 2d 466 (1975); *Brotherhood of Locomotive Engineers* v. *Chicago & North Western Ry. Co.*, 314 F. 2d 424 (8th Cir. 1963), *aff'g*

Chicago & North Western Ry. Co. v. *Brotherhood of Locomotive Engineers*, 202 F. Supp. 277 (S.D. Ia. 1962).

IV

On the merits the Authority makes two arguments for reversal: first, that as an alternative to interest arbitration the parties had a right to terminate their contractual relationship. Second, that an agreement by the Authority to binding interest arbitration would be illegal as an impermissible delegation of power by a public body. We reject both arguments.

A

The controversy between the parties actually involves three separate and distinct contracts: (1) the underlying collective bargaining agreement between the Authority and the Union; (2) the § 13(c) agreement between the Authority and the Union; and (3) the grant contract between the Authority and the government. This suit is based on the § 13(c) contract and not on the collective bargaining agreement or on the contract between the Authority and the government.

The first § 13(c) contract between the Union and the Authority was entered into in 1968; however, that contract does not differ substantially from the one that was entered into in 1973 and which has been extended to grants that the Authority has received from the government since that time. Section 24 of the 1973 § 13(c) agreement is as follows:

> In the event the Project is approved for assistance under the Act, the foregoing terms and conditions shall be made part of the contract of assistance between the federal government and the applicant for federal funds,

> provided, however, that this agreement shall not merge into the contract of assistance, but shall be independently binding and enforceable by and upon the parties hereto, in accordance with its terms; nor shall the collective bargaining agreement between the Union and the operator of the transit system merge into this agreement, but each shall be independently binding and enforceable by and upon the parties thereto, in accordance with its terms.

The termination and arbitration provisions of the collective bargaining agreement between the Union and the Authority that was executed in 1974 appear as §§ 4 and 9 of that agreement, and those sections do not differ substantially, if at all, from comparable provisions appearing in the last collective bargaining agreement that the Union and Transit entered into in 1967. It appears to us that under the 1974 agreement either side could have avoided interest arbitration by giving a sixty day notice of termination. As has been pointed out, however, this suit is based on the § 13(c) agreement, and the rights of the parties must be measured by that agreement which is not identical in terms to the collective bargaining agreement. The controlling provision of the § 13(c) agreement is § 17 of that agreement which, insofar as here pertinent, is as follows:

> In the case of any labor dispute (except as defined in paragraph (11) hereof) where collective bargaining does not result in agreement after all reasonable efforts to agree in good faith, the same may be submitted at the written request of either party to a board of arbitration composed of three (3) persons as hereinafter provided, one to be chosen by the Authority, one to be chosen by the Union, and the two thus selected to select a third disinterested arbitrator; the findings of

the majority of said board of arbitration shall be final and binding on the parties hereto; all contract conditions shall remain undisturbed and there shall be no lockouts, strikes, walk-outs or interference with or interruption of service during the arbitration proceedings.

Each party shall appoint its arbitrator within five (5) days after notice of submission to arbitration has been given. If the two arbitrators selected by the parties are unable to agree upon the selection of the third arbitrator within five (5) days from the date of appointment of the second-named arbitrator, then either arbitrator may request the American Arbitration Association to furnish a list of seven (7) members of the National Academy of Arbitrators from which the third arbitrator shall be selected. The arbitrators appointed by the parties shall, within five (5) days after the receipt of such list determine by lot the order of elimination, and thereafter each shall, in that order, alternatively eliminate one name until only one name remains. The remaining person on the list shall be the third arbitrator. In each instance, the foregoing time limits are exclusive of Saturday, Sunday and holidays. Such time limits may be extended by mutual agreement of the parties in writing.

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The term "labor dispute" shall be broadly construed and shall include any controversy concerning wages, salaries, working conditions or benefits, including health and welfare, sick leave, insurance or pension or retirement provisions, the making or maintenance of collective bargaining agreements, the terms to be included in such agreements, the interpretation of application of such agreements, the adjustments of

> grievances, any claim, difference, or controversy arising out of or by virtue of any of the provisions of this agreement for the protection of employees covered by this agreement affected by the Project.

The arbitration board shall make every reasonable effort to render its decision within thirty (30) days from the date of the completion of the hearings in the proceedings, or within such longer period as the parties to the proceedings may mutually agree upon in writing. The decision of the arbitration board shall be in writing, signed by a majority of the members thereof, and original counterparts thereof shall be filed with the Authority and the Union.

Nothing in this paragraph (17) shall be construed to enlarge or limit the right of either party to utilize, upon the expiration of any collective bargaining agreement, any economic measures that are consistent or not in conflict with applicable law.

[6] In view of that language, we are of the opinion that the contract required interest arbitration at the request of either party upon the expiration of a collective bargaining agreement. Our conclusion is bolstered by the history of negotiations between the parties that is revealed by the record, and by the fact that on two occasions prior to 1977 contract differences between the Authority and the Union were in fact resolved by interest arbitration rather than by strikes or other economic measures.

B

[7] In the district court the Authority contended broadly that an agreement to arbitrate the terms of a future collective bargaining agreement will not be enforced by the courts. Judge Oliver properly rejected that contention. *See Winston-Salem Printing Pressmen & Assistants' Union*

v. *Piedmont Publishing Co. of Winston-Salem*, 393 F. 2d 221 (4th Cir. 1968); *Greater Kansas City Laborers District Council* v. *Builders Ass'n of Kansas City*, 217 F. Supp. 1 (W.D. Mo. 1963), *aff'd*, 326 F. 2d 867 (8th Cir.), *cert. denied*, 377 U. S. 917, 84 S. Ct. 1182, 12 L. Ed. 2d 186 (1964).

The Authority contends here that any obligation on its part of [sic] engage in binding interest arbitration would amount to an unlawful delegation of the powers and authority that have been conferred upon it as a public body. We do not think that this argument can be sustained in the context of the present case.

[8] As is well known, the federal policy in favor of arbitration as a means of settling labor disputes is a very strong one. In addition to the cases last cited, *see* the familiar *"Steel Workers Trilogy"* of cases beginning with *United Steel Workers of America* v. *American Mfg. Co.*, 363 U. S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403 (1960); *see also General Electric Co.* v. *Local 205, United Electrical, Radio & Machine Workers of America*, 353 U. S. 547, 77 S. Ct. 921, 1 L. Ed. 2d 1028 (1957), and *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972 (1957).

That policy would appear to be particularly applicable in the vital area of urban mass transit where strikes of workers are in the highest degree undersirable from the standpoint of the public.[4]

[9] We recognize that under the laws of some states employees of public agencies are not accorded collective bargaining rights nor do they enjoy the benefits of such bargaining, including arbitration. We think, however, that when a state or a combination of states forms a public transit agency for the express purpose of obtaining federal money to enable it to take over the business of a private transit company, and where the agency in order to obtain the money enters into a § 13(c) agreement that calls for interest arbitration, the obligation to arbitrate is binding on the agency, regardless of general state law or policy.

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[4] In this connection we call attention to the findings of Congress as to the importance of mass urban transportation that are set out in 49 U.S.C. §§ 1601, 1601a and 1601b.

We agree with Judge Doyle in *Local 519, supra,* 445 F. Supp. at 811, that Congress intended that the rights of transit employees be protected by contracts, and that it intended that the contracts entered into by the parties and approved by the Secretary of Labor would be enforceable, and that it would be fatuous to hold otherwise.

The judgment of the district court is affirmed.

UNITED STATES DISTRICT COURT

W. D. MISSOURI, W. D.

No. 77-0663-CV-W-2

Division 1287, Amalgamated Transit
Union, AFL-CIO - - - - - *Plaintiff*

v.

Kansas City Area Transportation
Authority - - - - - - *Defendant*

OPINION—February 21, 1980.

Union which was recognized collective bargaining representative for some employees of the Kansas City Area Transportation Authority brought suit against the Authority to obtain a judgment for certain unpaid pension benefits. The Authority answered and counterclaimed for a declaratory judgment. Thereafter, the parties entered into a joint stipulation of facts and the District Court, Collinson, J., held that: (1) the question of the validity of an arbitration award or collective bargaining agreement rendered pursuant to procedures required by an agreement entered into under the Urban Mass Transportation Act is a question arising under the laws of the United States; (2) the federal court had jurisdiction of the suit; (3) the contracts between the parties were to be interpreted and enforced under federal law, and not under the law of the State of Missouri; (4) the transportation authority's obligations under the collective bargaining agreement it entered into pursuant to the UMTA were binding on the Authority regardless of general state law or policy; (5) even if Missouri law were applicable, the pension benefits in dispute would not be barred by the Missouri Constitution; and (6) because the Transportation Authority did not act in bad faith, vexatiously, wantonly, or for oppressive reasons in refusing to pay the disputed benefits, the union was not entitled to attorneys' fees and costs.

Judgment for plaintiff.

1. Labor Relations—Key 52

Where statutes which created public entity to operate urban transportation system characterized the entity created as "a political subdivision of the States of Missouri and Kansas," the public entity was a political subdivision of a state and, therefore, was not an "employer" within the meaning of the National Labor Relations Act or the Labor Management Relations Act. National Labor Relations Act, § 2(2) as amended 29 U.S.C.A. § 152(2); V.A.M.S. § 238.010, arts. I et seq., III; K.S.A. 12-2524, arts. I et seq., III; Labor Management Relations Act § 301(a), 29 U.S.C.A. § 185(a).

See publication Words and Phrases for other judicial constructions and definitions.

2. Federal Courts—Key 202

Where urban transportation authority was not an employer within the meaning of the Labor Management Relations Act section which provides for jurisdiction over suits for violations of contract between an employer and a union representing employees in an industry affecting commerce, federal district court did not have jurisdiction under the section over contract dispute between the transportation authority and the collective bargaining representative of some employees of the authority. Labor Management Relations Act, 1947, § 301(a), 29 U.S.C.A. § 185(a).

3. Federal Courts—Key 192

An arbitration agreement is a prerequisite to jurisdiction under the section which creates jurisdiction in federal courts when "the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration." 9 U.S.C.A. § 9.

4. Federal Courts—Key 204

In absence of any agreement between urban transportation authority and union which represented some of the authority's employees that a judgment on an arbitration award could be entered in any court, the section which creates jurisdiction in federal court when the parties have agreed that a judgment of the court shall be entered on an award made pursuant to arbitration did not provide basis for jurisdiction over contract dispute between transportation authority and the union. 9 U.S.C.A. § 9.

5. Federal Courts—Key 204

The question of the validity of an arbitration award or a collective bargaining agreement rendered pursuant to procedures required by an agreement made under the Uniform Mass Transportation Act provision which mandates fair and equitable arrangements to protect interests of employees is a question "arising under the laws of the United States" within the meaning of the section which creates federal jurisdiction of civil actions which arise under the Constitution, laws or treaties of the United States. 28 U.S.C.A. § 1331(a); Urban Mass Transportation Act of 1964, § 13(c), 49 U.S.C.A. § 1609(c).

See publication Words and Phrases for other judicial constructions and definitions.

6. Federal Courts—Key 202

Federal district court had jurisdiction of contract dispute between urban mass transit authority and union which represented some of the authority's employees where the collective bargaining agreement between the transportation authority and the union was entered into pursuant to the Urban Mass Transportation Act. 28 U.S.C.A. § 1331(a); Urban Mass Transportation Act of 1964, § 13(c), 49 U.S.C.A. § 1609(c).

7. Federal Courts—Key 421

Where various contracts between urban transportation authority and labor organization representing some of the transportation authority's employees were executed pursuant to the Urban Mass Transportation Act, the contracts were to be interpreted and enforced under federal and not under state law. Urban Mass Transportation Act of 1964, § 13(c), 49 U.S.C.A. § 1609(c).

8. Labor Relations—Key 432

Obligations of transportation authority, a political subdivision of the states of Missouri and Kansas, under collective bargaining agreement which the authority entered into pursuant to the Urban Mass Transportation Act, were binding on the authority regardless of general state law or policy. Urban Mass Transportation Act of 1964, § 13(c), 49 U.S.C.A. § 1609(c).

9. Municipal Corporations—Key 220(9)
United States—Key 82(3)

Any money authorized or spent pursuant to the Missouri statute which provided the Kansas City Area Transportation Authority with the authority to enter into whatever contract the Secretary of Labor might require under the

Urban Mass Transportation Act as a prerequisite to obtaining federal funds would be utilized for the public purpose of complying with federal prerequisites for grants to permit operation of a public urban transportation system and, therefore, the Missouri Constitution would not interfere with payment of pension benefits required under such contract, even assuming that Missouri law was applicable to contract dispute regarding such benefits. V.A.M.S. § 238.-100; Urban Mass Transportation Act of 1964, § 13(c), 49 U.S.C.A. § 1609(c).

10. Labor Relations—Key 131.8

Where urban transportation authority did not act in bad faith, vexatiously, wantonly or for oppressive reasons in refusing to pay disputed pension benefits but refused to pay the benefits for the sole reason that a Missouri Supreme Court decision cast serious doubt on the constitutional validity of the pension benefits and where the authority filed its counterclaim for the purpose of resolving the doubt created by the Missouri decision, union was not entitled to attorney fees and expenses that it incurred in enforcing payment of the benefits.

Michael D. Gordon, of Jolley, Moran, Walsh, Hager & Gordon, Kansas City, Mo., for plaintiff.

Norman O. Sanders, of Sheridan, Sanders & Simpson, Kansas City, Mo., for defendant

MEMORANDUM OPINION AND FINAL ORDER

COLLINSON, District Judge.

In 1965, the States of Missouri and Kansas created the Kansas City Area Transportation Authority (hereinafter KCATA) through an agreement that was eventually approved by the State of Missouri, the State of Kansas, and the United States. Prior to the existence of the KCATA, ten separate bus companies, including Kansas City Transit, Inc., provided public transportation for the metropolitan Kansas City area. The States of Missouri and Kansas collaborated to create the KCATA for the purpose of providing a unified urban transportation system for the metropolitan Kansas City area. One impetus for the creation of the KCATA was the passage, by Congress, in 1964, of the Urban Mass Transportation Act, 49 U.S.C. § 1601 *et seq.* (hereinafter UMTA). Through UMTA, Congress authorized the Secretary of Transportation to finance, with federal loans and grants, the creation and operation of public entities, like KCATA, that would operate urban transportation systems in cities throughout the United States. Since the date of its creation, the KCATA has recognized Division 1287, Amalgamated Transit Union, AFL-CIO (hereinafter Local 1287) as the collective bargaining representative for some, but not all, of KCATA's employees.

This action arose over a dispute between Local 1287 and the KCATA concerning certain benefits for retired and disabled bus line employees. During negotiations for their 1975 contract, Local 1287 and KCATA agreed, among other things, that, under the 1975 contract, KCATA would increase, by 10%, the pension benefits of certain retired and disabled bus line employees. Local 1287 and KCATA were unable to agree, however, on the union's request that the 1975 contract provide for increased hospital and medical benefits for certain retirees. Local 1287 and KCATA agreed to submit that dispute to a board of arbitration for final and binding resolution. On October 15, 1976, the board of arbitration issued a decision in which it awarded, for the 1975 contract period, increased hospital and medical benefits for certain retirees. The KCATA has refused, however, to pay either the 10% increase in pension benefits to which it agreed in the 1975 contract or the increased hospital and medical benefits awarded by the board of arbitration on October 15, 1976.

On September 7, 1977, Local 1287 filed this action against the KCATA seeking, among other things, a judgment for the unpaid pension benefits described above. On October 25, 1977, the KCATA filed its answer and a counterclaim for a declaratory judgment. As modified by this Court's Order of April 7, 1978, the KCATA's counterclaim requests that this Court declare that both the KCATA's agreement to increase pension benefits by 10% and the arbitration board decision awarding the increased medical benefits for pensioners are void.

After extensive discovery on the merits of this action, the parties entered into a joint stipulation of facts, filed with this Court on December 28, 1978. Both parties have also stipulated that they do not desire to present any other facts to this Court concerning this action. This Court has carefully reviewed the parties' joint stipulations, which are hereby incorporated into this opinion, and finds them sufficient for this Court to render judgment on the parties' opposing claims. After filing their joint stipulations, the parties filed, on February 28, 1979, briefs in support of their respective positions. On March 19, 1979, the parties filed briefs in response to the briefs filed on February 28, 1979. Since all material facts have been stipulated by the parties, and since the parties have been presented a full opportunity to file briefs on the legal questions presented, the cause is ready for decision.

Local 1287 alleges three different bases for this Court's jurisdiction over its claims. Although the KCATA concedes that jurisdiction is proper under one of the three bases alleged, this Court will, because of the importance of this question in determining the law that will be applied to the merits of the action, address the basis upon which this Court has determined that it may exercise jurisdiction over this dispute.

[1, 2] Plaintiff first contends that this Court has jurisdiction over its claims under the Labor Management Relations Act, particularly 29 U.S.C. § 185 (1976). That section provides, in pertinent part:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a) (1976). This Court is not convinced that jurisdiction over this dispute is proper under § 185(a). Although this action does, at least in part, concern the breach of a contract between Local 1287 and the KCATA, this Court is *not* convinced that the KCATA is an employer as that term is defined in 29 U.S.C. § 152(2) (1976). That section provides that "[t]he term 'employer' . . . shall not include . . . any State or political subdivision thereof . . ." 29 U.S.C. § 152(2) (1976). Article III of the statutes creating the KCATA, Mo. Rev. Stat. § 238.010 et seq. and Kan. Stat. Ann. § 12-2524, states that the KCATA is "a political subdivision of the States of Missouri and Kansas." Based upon that characterization in the statutes, this Court must hold that the KCATA is a political subdivision of a State and is *not*, therefore, an "employer" within the meaning of the Labor Management Relations Act. *Crilly* v. *Southeastern Pennsylvania Transportation Authority*, 529 F. 2d 1355, 1358 (3d Cir. 1976).

Thus, since the KCATA is not an employer within the meaning of the Labor Management Relations Act, this Court does not have jurisdiction, under 29 U.S.C. § 185(a), over a contract dispute between the KCATA and a labor organization like Local 1287.

[3, 4] Second, Local 1287 alleges that 9 U.S.C. § 9 (1976) is an independent jurisdictional basis for this action. This Court disagrees. That section creates jurisdiction in the federal courts only, "If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration . . ." 9 U.S.C. § 9 (1976). This Court has reviewed the various arbitration agreements entered into between the KCATA and Local 1287, but has found *no* agreement that a judgment on an arbitration award may be entered in *any* court. Since such an agreement is a prerequisite to jurisdiction under 9 U.S.C. § 9, and since that prerequisite is not present in this case, this Court must hold that jurisdiction over this action may not be premised on 9 U.S.C. § 9 (1976).

Plaintiff also alleges that this Court has jurisdiction over its claim under the provisions of 28 U.S.C. § 1331 (1976). That section provides, in pertinent part:

> (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

28 U.S.C. § 1331(a) (1976). There is no dispute that this action meets the $10,000.00 amount in controversy require-

ment of § 1331(a). There remains, however, the question whether this action "arises under the Constitution, laws, or treaties of the United States."

Plaintiff contends that this action arises under § 13(c) of the UMTA, 49 U.S.C. § 1609 (1976) (hereinafter § 13 (c)). That subsection provides:

> (c) It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.

Pursuant to § 13(c), the parties to this action entered into the following agreement, which was in effect during negotiations for their 1975 contract, to submit to binding interest arbitration if collective bargaining failed to produce a contract:

> In the case of any labor dispute (except as defined in paragraph (11) hereof) where collective bargaining does not result in agreement after all reasonable efforts to agree in good faith, the same may be submitted at the written request of either party to a board of arbitration composed of three (3) persons as hereinafter provided, one to be chosen by the Authority, one to be chosen by the Union, and the two thus selected to select a third disinterested arbitrator; the findings of the majority of said board of arbitration shall be final and binding on the parties thereto; all contract conditions shall remain undisturbed and there shall be no lockouts, strikes, walkouts or interference with or interruption of service during the arbitration proceedings.
>
> Each party shall appoint its arbitrator within five (5) days after notice of submission to arbitration has been given. If the two arbitrators selected by the parties are unable to agree upon the selection of the third arbitrator within five (5) days from the date of appointment of the second-named arbitrator, then either arbitrator may request the American Arbitration Association to furnish a list of seven (7) members of the National Academy of Arbitrators from which the third arbitrator shall be selected. The arbitrators appointed by the parties shall, within five (5) days after the receipt of such list determine by lot the order of elimination, and thereafter each shall, in that order, alternatively eliminate one name until only one name remains. The remaining person on the list shall be the third arbitrator. In each instance, the foregoing time limits are exclusive of Saturday, Sunday and holidays. Such

> time limits may be extended by mutual agreement of the parties in writing.
>
> The salaries and expenses of the third arbitrator shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.
>
> The term "labor dispute" shall be broadly construed and shall include any controversy concerning wages, salaries, working conditions or benefits, including health and welfare, sick leave, insurance or pension or retirement provisions, the making or maintenance of collective bargaining agreements, the terms to be included in such agreements, the interpretation or application of such agreements, the adjustments of grievances, any claim, difference, or controversy arising out of or by virtue of any of the provisions of this agreement for the protection of employees covered by this agreement affected by the Project.
>
> The arbitration board shall make every reasonable effort to render its decision within thirty (30) days from the date of the completion of the hearings in the proceedings, or within such longer period as the parties to the proceedings may mutually agree upon in writing. The decision of the arbitration board shall be in writing, signed by a majority of the members thereof, and original counterparts thereof shall be filed with the Authority and the Union.
>
> Nothing in this paragraph (17) shall be construed to enlarge or limit the right of either party to utilize, upon the expiration of any collective bargaining agreement, any economic measures that are consistent or not in conflict with applicable law.

Plaintiff's position, as this Court understands it, is that, since the action is based upon a breach of the parties'

§ 13(c) agreement, the action arises under § 13(c). The precise question before this Court is, therefore, whether an action to enforce an arbitration award or a collective bargaining agreement, made pursuant to procedures required by a § 13(c) agreement, is an action arising under the laws of the United States. Although there are no reported decisions on that question, there are reported decisions on related questions, including the Eighth Circuit's recent decision concerning another dispute between these parties. In *Division 1287, Amalgamated Transit Union, AFL-CIO* v. *Kansas City Area Transportation Authority,* 582 F. 2d 444 (8th Cir. 1978) (hereinafter *KCATA I*), one question before the Court of Appeals was whether an action by Local 1287 to compel the KCATA to submit a dispute over their 1977 contract to binding arbitration was a suit arising under § 13(c). In holding that the suit did arise under § 13(c) and, thus, under the laws of the United States, the Court of Appeals reasoned that, since KCATA's contractual promise to submit to binding arbitration when collective bargaining failed to produce an agreement was a promise required by § 13(c) of the UMTA, a suit to compel KCATA to submit to such arbitration is a suit arising out of and based primarily upon § 13(c). The Court of Appeals stated, "Although the question is not free from doubt, we now hold that a controversy between a public transit agency and a labor union involving a claim of breach of a § 13(c) agreement is a controversy that arises under the laws of the United States." *KCATA I,* 582 F. 2d 444, 450 (8th Cir. 1978). The Court of Appeals went on to hold that the parties' § 13(c) agreement required them to submit to binding interest arbitration:

> [W]hen a state or a combination of states forms a public transit agency for the express purpose of obtaining federal money to enable it to take over the

> business of a private transit company, and where the agency in order to obtain the money enters into a § 13(c) agreement that calls for interest arbitration, the obligation to arbitrate is binding on the agency, regardless of general state law or policy.

KCATA I, 582 F. 2d 444, 452-453 (8th Cir. 1978).

[5, 6] *KCATA I* makes clear that the question whether the parties to a § 13(c) agreement must submit to binding interest arbitration is a question arising under the laws of the United States. This Court takes the next logical step beyond *KCATA I* by holding that the question of the validity of an arbitration award or a collective bargaining agreement rendered pursuant to procedures required by a § 13(c) agreement is also a question arising under the laws of the United States. This holding is supported by the Eighth Circuit's clear language in *KCATA I* and by the cases cited by the Court of Appeals in that opinion. First, as discussed above, the Court of Appeals specifically stated in *KCATA I,* "[W]e now hold that a controversy between a public transit agency and a labor union involving a claim of breach of a § 13(c) agreement is a controversy that arises under the laws of the United States." *KCATA I,* 582 F. 2d 444, 450 (8th Cir. 1978). In the portion of the parties' § 13(c) agreement quoted above, the parties agreed that the arbitrators' decision would be final and binding. The parties also agreed, in their § 13(c) agreement, to bargain over certain subjects. The KCATA's present refusal to comply with the arbitrators' decision and the 1975 collective bargaining agreement must, therefore, be construed as a breach of the parties' § 13(c) agreement. Thus, like the controversy in *KCATA I,* since the controversy in this case involves a claim of a breach of a § 13(c) agreement, the case must be one arising under the laws of the United States.

Second, that conclusion is supported by *International Association of Machinists, AFL-CIO* v. *Central Airlines, Inc.*, 372 U.S. 682, 83 S. Ct. 956, 10 L. Ed. 2d 67 (1963) (hereinafter *Central Airlines*), the case upon which the Eighth Circuit relied in concluding that a suit to compel arbitration required by a § 13(c) agreement arises under the laws of the United States. *KCATA I,* 582 F. 2d 444, 450 (8th Cir. 1978). The question presented in *Central Airlines* was whether a suit to enforce an award of an airline board of adjustment arose out of the Railway Labor Act. In answering that question in the affirmative, the Court stated:

> The contract of the parties here was executed under § 204 and declares a system board award to be final, binding, and conclusive. The claim stated in the complaint is based upon the award and demands that it be enforced. Whether Central must comply with the award or whether, instead, it is impeachable, are questions controlled by federal law and are to be answered with due regard for the statutory scheme and purpose. To the extent that the contract imposes a duty consistent with the Act to comply with the awards, that duty is a federal requirement. If Central must comply, it is because federal law requires its compliance.

Central Airlines, 372 U. S. 682, 695, 83 S. Ct. 956, 963, 10 L. Ed. 2d 67 (1963). The principle recognized in *Central Airlines,* that an action to enforce a contract mandated by federal statute arises under federal law, *Local Division 519, Amalgamated Transit Union, AFL-CIO* v. *LaCrosse Municipal Transit Utility, et al.*, 585 F. 2d 1340, 1347 (7th Cir. 1978) (hereinafter *LaCrosse*), controls the question whether this case arises under § 13(c). *KCATA I,* 582 F. 2d 444, 450 (1978). Accordingly, this Court concludes that this action arises under § 13(c) of the UMTA and, therefore, that this Court has jurisdiction over plaintiff's claims under 28 U.S.C. § 1331(a)(1976). Since defendant's counterclaim for declaratory judgment requires decision of the same questions presented by plaintiff's claims, this Court also has jurisdiction over defendant's counterclaim under 28 U.S.C. § 1331(c) (1976).

The major question in this action is whether certain provisions of the Missouri Constitution invalidate both the KCATA's agreement to increase certain pension benefits and the board of arbitration's award of increased health and medical benefits to certain pensioners. The parties take diametric positions on this question. The KCATA argues that the Missouri Supreme Court's decision in *Police Retirement System* v. *Kansas City*, 529 S.W. 2d 388 (Mo. 1975) (hereinafter *Police Retirement System*) bars the KCATA from paying these increased pension benefits. In that case, the Missouri Supreme Court held that R.S. Mo. § 86.441, to the extent that it permitted the payment of increased pension benefits to retired police officers, violated Article III § 39(3) and/or Article VI § 25 of the Missouri Constitution. *Police Retirement System,* 529 S.W. 2d 388, 393 (Mo. 1975). Those two sections of the Missouri Constitution provide: Article III § 39(3):

> The general assembly shall not have power:
>
> To grant or to authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor after service has been rendered or a contract has been entered into and performed in whole or in part;

Article VI § 25:

> No county, city or other political corporation or subdivision of the state shall be authorized to lend its

> credit or grant public money or property to any private individual, association or corporation except as provided in Article VI, Section 23(a) and except that the general assembly may authorize any county, city or other political corporation or subdivision to provide for the retirement or pensioning of its officers and employees and the widows and children of deceased officers and employees and may also authorize payments from any public funds into a fund or funds for paying benefits upon retirement, disability or death to persons employed and paid out of any public fund for educational services and to their beneficiaries or estates; and except, also, that any county of the first class is authorized to provide for the creation and establishment of death benefits, pension and retirement plans for all its salaried employees, and the widows and minor children of such deceased employees.

The KCATA's position on this point, as this Court understands it, is that, to the extent that R.S. Mo. § 238.100 authorizes the KCATA to bargain concerning, or to submit to binding arbitration, a union request for increased pension benefits for already retired bus line employees, § 238.-100 violates Article III § 39(3) and/or Article VI § 25 of the Missouri Constitution. In opposition to that position, Local 1287 argues two points: first, that federal law, not State law, controls this question; and second, that, even if applicable, Missouri law does not bar the benefits in dispute in this case. This Court agrees with Local 1287's arguments.

[7] This Court holds, without hesitation, that the contracts between the parties to this dispute must be interpreted and enforced under federal law, not the laws of the State of Missouri. The various contracts between the KCATA and Local 1287 were executed pursuant to § 13(c)

of the UMTA. If those contracts are to serve the functions clearly indicated in both § 13(c) and its legislative history, the interpretation of those contracts cannot be abandoned to the vagaries of State law. *Central Airlines,* 372 U. S. 682, 691-695, 83 S. Ct. 956, 961-963, 10 L. Ed. 2d 67 (1963). The Court of Appeals reached this same conclusion in *KCATA I.* In that case, one point argued by the KCATA was that the binding interest arbitration agreement included in the parties' § 13(c) agreement was invalid under Missouri law. *KCATA I,* 582 F. 2d 444, 452 (8th Cir. 1978). The Court of Appeals rejected the KCATA's argument that Missouri law controls the validity of the parties' § 13(c) agreement:

> The Authority contends here that any obligation on its part [to] engage in binding interest arbitration would amount to an unlawful delegation of the powers and authority that have been conferred upon it as a public body. We do not think that this argument can be sustained in the context of the present case.
>
> As is well known, the federal policy in favor of arbitration as a means of settling labor disputes is a very strong one. In addition to the cases last cited, *see* the familiar *"Steel Workers Trilogy"* of cases beginning with *United Steel Workers of America* v. *American Mfg. Co.,* 363 U. S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403 (1960); *see also General Electric Co.* v. *Local 205, United Electrical, Radio & Machine Workers of America,* 353 U. S. 547, 77 S. Ct. 921, 1 L. Ed. 2d 1028 (1957), and *Textile Workers Union* v. *Lincoln Mills,* 353 U. S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972 (1957).
>
> That policy would appear to be particularly applicable in the vital area of urban mass transit where strikes of workers are in the highest degree undesirable from the standpoint of the public.

> We recognize that under the laws of some states employees of public agencies are not accorded collective bargaining rights nor do they enjoy the benefits of such bargaining, including arbitration. We think, however, that when a state or a combination of states forms a public transit agency for the express purpose of obtaining federal money to enable it to take over the business of a private transit company, and where the agency in order to obtain the money enters into a § 13(c) agreement that calls for interest arbitration, the obligation to arbitrate is binding on the agency, regardless of general state law or policy.

KCATA I, 582 F. 2d 444, 452-453 (8th Cir. 1978). In light of the Court of Appeals' holding in *KCATA I,* this Court must hold that Missouri law does not apply to either the § 13(c) agreement between the KCATA and Local 1287 or the collective bargaining agreements entered into pursuant to the § 13(c) agreement.

[8] The § 13(c) agreement between the parties here is virtually identical to the § 13(c) agreement construed by the Court of Appeals in *KCATA I.* The § 13(c) agreement in effect at the time this dispute arose requires collective bargaining on certain subjects, including health and welfare benefits and pension and retirement allowances. That agreement also requires binding interest arbitration if collective bargaining fails to produce a contract. Under the holding of *KCATA I* the KCATA's obligations under that § 13(c) agreement are binding on it "regardless of general state law or policy." *KCATA I,* 582 F. 2d 444, 453 (8th Cir. 1978).

[9] In addition, this Court is convinced, and accordingly holds, that even if Missouri law were applicable to this controversy, the pension benefits in dispute here are not barred by the Missouri Constitution. In *State ex rel.*

Farmers Electric Cooperative, Inc. v. *State Environmental Improvement Authority,* 518 S. W. 2d 68 (Mo. 1975) (hereinafter *Farmers Electric*), the Missouri Supreme Court set forth the applicable principles for construction of the Missouri Constitution:

> The [Missouri] state constitution, unlike the federal constitution, is not a grant of power, but as to legislative power, it is only a limitation; and, therefore, except for the restrictions imposed by the state constitution, the power of the state legislature is unlimited and practically absolute. *Kansas City* v. *Fishman,* 362 Mo. 352, 241 S. W. 2d 377 (1951). An act of the legislature is presumed to be valid and will not be declared unconstitutional unless it clearly and undoubtedly contravenes some constitutional provision. *State ex rel. Eagleton* v. *McQueen,* 378 S. W. 2d 449 (Mo. banc 1964). Legislative enactments should be recognized and enforced by the courts as embodying the will of the people unless they are plainly and palpably a violation of the fundamental law of the constitution. *Borden Company* v. *Thomason,* 353 S. W. 2d 735 (Mo. banc 1962).

Farmers Electric, 518 S. W. 2d 68, 72 (Mo. 1975). Applying those principles in this case, this Court cannot hold that R.S. Mo. § 238.100 "clearly and undoubtedly contravenes some constitutional provision." On the contrary, Article VI § 25 of the Missouri Constitution, as set forth above, appears to specifically authorize laws like § 238.100. Moreover, in *Farmers Electric, supra,* the Missouri Supreme Court held that Missouri Constitutional spending limitations are not violated by expenditures for public purposes:

> It has long been recognized in Missouri, as relator acknowledges, that the constitutional prohibitions

> noted are not violated when money and property are expended or utilized to accomplish a "public purpose." Does the preservation of the state's natural resources have such a purpose? As was said in *Laret Inv. Co.* v. *Dickmann*, 345 Mo. 449, 134 S. W. 2d 65 (1939) at l. c. 68: "To be guided solely by whether a given activity had, at some previous time, been recognized as a public purpose would make the law static. Such a standard would compel us to retain in the law, as appropriate for public expenditure, activities which have ceased to be of public concern; and would prevent us from adopting new public functions regardless of how essential to the public welfare they may have become by reason of changed conditions." *State* v. *Land Clearance for Redevelopment Auth.*, 270 S. W. 2d 44 (Mo. banc 1954); *Land Clearance for Redevelopment Auth.* v. *City of St. Louis*, 270 S. W. 2d 58 (Mo. banc 1954).

Farmers Electric, 518 S. W. 2d 68, 74 (Mo. 1975). A review of § 238.100 and its legislative history compels the conclusion that its major purpose was to provide that KCATA with the authority to enter whatever contract the Secretary of Labor might require, under § 13(c), as a prerequisite to obtaining UMTA federal grants. This Court holds, therefore, that any money authorized or spent pursuant to § 238.100 is utilized for a public purpose; the purpose of complying with federal prerequisites to obtaining massive federal grants, which will permit the operation of a public urban transportation system in the metropolitan Kansas City area. The Missouri Supreme Court's decision in *Police Retirement System*, 529 S. W. 2d 388 (Mo. 1975), does not compel a contrary conclusion. That decision concerned only the constitutional validity of R.S. Mo. § 86.441. That statute, § 86.441, is not involved, in any way, in this case. In addition, there was no analysis in *Police Retire-*

ment System of the purpose for which the challenged expenditures were made.

Accordingly, since this Court concludes that the Missouri Constitution does *not* interfere with the payment of the pension benefits in dispute in this case, and since this Court finds no ambiguity in the clear terms of either the 1975 collective bargaining agreement or the October 15, 1976 board of arbitration award, this Court holds: first, that the provision in the 1975 collective bargaining agreement between KCATA and Local 1287 for a 10% increase in pension benefits for previously retired employees is valid, binding, and will be enforced; and second, that the October 16, 1976 board of arbitration award of increased medical benefits for previously retired employees is final, binding, and will be enforced.

[10] Finally, Local 1287 requests an award of the attorneys' fees and expenses that it has incurred in this action. That request will be denied. The general rule concerning an award of attorneys' fees and expenses is "that absent statute or enforceable contract, litigants pay their own attorneys' fees." *Alyeska Pipeline Co.* v. *Wilderness Society, et al.,* 421 U. S. 240, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975) (hereinafter *Alyeska Pipeline Co.*). This Court recognizes that there exists an exception to that general rule, "when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Alyeska Pipeline Co.,* 421 U. S. 240, 258-59, 95 S. Ct. 1612, 1622, 44 L. Ed. 2d 141 (1975); *United Steelworkers of America, AFL-CIO* v. *Butler Mfg. Co.,* 439 F. 2d 1110, 1112-13 (8th Cir. 1971).

Based upon the parties' stipulations and the record before this Court, this Court finds that the KCATA did not act in bad faith, vexatiously, wantonly, or for oppressive reasons in refusing to pay the pension benefits in dispute in this case. The KCATA refused to pay the benefits for the sole reason that the Missouri Supreme Court's decision in *Police Retirement System,* 529 S. W. 2d 388 (Mo. 1975), cast serious doubt on the Constitutional validity of those pension benefits. The KCATA filed its counterclaim in this action for the purpose of resolving the doubt created by *Police Retirement System.* On these facts, and in light of the legal standard set forth in *Alyeska Pipeline Co.,* Local 1287's request for attorneys' fees and expenses will be denied.

For the reasons set forth above, it is

ORDERED that judgment in this action in favor of Local 1287 and against the KCATA, as set forth above, be, and hereby is, granted; and it is

ORDERED that, within 15 days of the date of this Order, plaintiff shall file a proposed form of final judgment in accordance with this Court's opinion set forth above.

Opposition

No. 81-804

Office-Supreme Court, U.S.
FILED
DEC 21 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1981

LOUISVILLE AND JEFFERSON COUNTY TRANSIT AUTHORITY, d/b/a TRANSIT AUTHORITY OF RIVER CITY,

Petitioner,

vs.

DIVISION 1447, AMALGAMATED TRANSIT UNION, AFL-CIO,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LOUISVILLE AND JEFFERSON COUNTY TRANSIT AUTHORITY, d/b/a TRANSIT AUTHORITY OF RIVER CITY,

Petitioner,

VS.

DIVISION 1447, AMALGAMATED TRANSIT UNION, AFL-CIO,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STATEMENT OF THE CASE

Petitioner, Louisville and Jefferson County Transit Authority, d/b/a Transit Authority of River City (hereinafter, "TARC" or "Transit Authority"), is an agency of local government, organized and existing pursuant to Chapter 96A, Ky. Rev. Stat. (hereinafter, "KRS"). In 1974, pursuant to the authority set out in KRS § 96A.020, the City of Louisville and Jefferson County created TARC as an agency and instrumentality of the State of Kentucky. Respondent, Division 1447, Amalgamated Transit Union (hereinafter "Union"), is an unincorporated labor organization representing workers in the transit industry for the purpose of collective bargaining. Prior to 1974, Respondent represented the employees of the privately owned Louisville Transit Company and Blue Motor Coach Company.

In 1974, the Transit Authority applied to the United States government for a capital improvement grant under the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1601 *et seq.* (hereinafter, "UMTA"), to assist the Authority in the acquisition of privately owned bus companies. As a condition of the receipt of federal UMTA funds, § 13(c) of UMTA, 49 U.S.C. § 1609(c), (hereinafter, "§ 13(c)") requires a grant recipient to make fair and equitable labor protective arrangements to protect its employees' interests. Specifically, § 13(c) requires:

> It shall be a condition of any assistance under this chapter that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provision as may

> be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements. 49 U.S.C. § 1609(c).

In enacting § 13(c), Congress decided that it was not feasible "to enumerate or set forth in great detail the provisions that may be necessary to assure the fair and equitable treatment of employees in each case"; accordingly, Congress intended the labor protective arrangements would "normally be the product of local bargaining and negotiation, subject to the basic standard of fair and equitable treatment." Senate Report No. 82, 88th Cong., 1st Sess. p. 28 (1963) (hereinafter, "Sen. Rep."). Congress also expected "the Secretary of Labor to . . . assume responsibility for developing criteria as to the types of provisions that may be considered as necessary to insure that worker interests are adequately protected against the kinds of adverse effects that may reasonably be anticipated in different types of situations." *Id.* Since enactment of § 13(c), the Secretary of Labor has insured the conclusion of fair and equitable labor protective arrangements as required by the Act, by: (1) notifying the labor organization involved of a grant application; and (2) requiring the parties to negotiate an agreement which he can certify as fair and equitable. 29 C.F.R. § 215.3. On February 26, 1974, Petitioner and Respondent entered into an agreement as required by § 13(c) of the Urban Mass Transportation Act. The Secretary of Labor certified the 1974 § 13(c) Agreement as fair and equitable under the Act.

The preamble to § 13(c) Agreement provides that it is the means of effectuating the federal statutory mandate:

> "§§ 13(e)(4) and 13(c) of the Act require, as a condition of assistance thereunder, that fair and equitable arrangements be made as determined by the Secretary of Labor, 'to protect the interests of employees affected by such assistance' "; (The 1974 § 13(c) Agreement is set forth at Petitioner's Appendix (hereinafter, "Pet. App."), p. 38-55; the preamble appears at p. 38).[1]

The § 13(c) Agreement provides that:

> (11) In the event of any labor dispute involving the Public Body and the employees covered by this agreement which cannot be settled within thirty (30) days after such dispute first arises, such dispute may be submitted at the written request of either the Union or the Public Body to a board of arbitration selected in accordance with the existing collective bargaining agreement if any, or if none, as hereinafter provided.

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[1] In its Statement of the Case, Petitioner assumes the conclusion of its Petition for Certiorari by characterizing the § 13(c) Agreement as "a private agreement." (Petition for Certiorari, [hereinafter, "Pet."], p. 4). Petitioner then belies its own characterization by describing the allegedly "private" agreement as making the "necessary 'protective arrangements' required by UMTA. . . ." (Pet., p. 4). Thus, the Agreement and the Petition both directly contradict Petitioner's *ad hominem* assertion that the § 13(c) Agreement is merely a "private" contract.

> . . . The term "labor dispute" shall be broadly construed and shall include, but not be limited to, any controversy concerning wages, salaries, hours, working conditions or benefits, including health and welfare, sick leave, insurance or pension and retirement provisions, the making or maintaining of collective bargaining agreements, any grievances that may arise, and any controversy arising out of or by virtue of any provisions of this agreement.[2] (Pet. App., pp. 44-45).

Thereafter, the parties repeatedly agreed to apply the terms of the 1974 § 13(c) Agreement to qualify for later grants of federal transit funds.

The collective bargaining agreement between Local 1447 and TARC expired in autumn, 1979. The parties bargained from July to December of 1979 without reaching agreement. Several times the Union demanded, pursuant to the § 13(c) Agreement, that Petitioner arbitrate over the terms of a new collective bargaining agreement. Petitioner refused. When the membership rejected TARC's last proposal by a vote of 357 to 1, the Union filed this action in the United States District Court for the Western District of Kentucky, seeking an order to compel TARC to proceed to arbitration pursuant to its commitments. On February 29, 1980, the District Court granted a preliminary injunction (Pet. App., pp. 24-25); on April 24, 1980, the District Court issued an order not material to these proceedings, clarifying the preliminary injunction. (Pet. App., p. 34). On July 28, 1981, the United States Court of Appeals for the Sixth Circuit affirmed the District Court order. In so doing, the United States Court of Appeals for the Sixth

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[2] Arbitration of a new collective bargaining agreement is known as "interest arbitration." Elkouri and Elkouri, *How Arbitration Works*, p. 47 (3rd ed. 1973). Interest arbitration is a hallmark of the local transit industry, where it has long been regarded as a much preferable alternative to greatly disruptive strikes. *Id.*, at p. 51, n. 26.

Circuit became the fifth panel of a Court of Appeals to support the Union's position that § 13(c) and the commitments it requires is enforceable federal law.[3]

SUMMARY OF ARGUMENT

This Court has already granted certiorari to consider the questions of jurisdiction and statement of a claim, presented again here. This case does not add anything to the Court's consideration of those questions.

Contrary to Petitioner's representations, this case does not present the issue of a conflict between state and federal law, because no such conflict exists here.

Finally, the federal action here, taken pursuant to Congress' spending power, does not present a Tenth Amendment problem warranting certiorari.

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[3] *Division 1287, Amalgamated Transit Union* v. *Kansas City Area Transportation Authority,* 582 F. 2d 444 (8th Cir. 1978), *cert. den.,* 99 S. Ct. 872 (1979) (hereinafter, "*Kansas City I*"); *Division 519, Amalgamated Transit Union* v. *LaCrosse,* 445 F. Supp. 798 (W.D. Wis. 1977) (preliminary injunction issued); *affirmed,* 585 F. 2d 1340 (7th Cir. 1978) (hereinafter, "*LaCrosse*"); *Division 714, Amalgamated Transit Union* v. *Greater Portland,* 589 F. 2d 1 (1st Cir. 1978) (hereinafter, "*Portland*"); *Local Division 1285, Amalgamated Transit Union* v. *Jackson Transit Authority,* 447 F. Supp. 88 (W.D. Tenn. 1977); *rev'd.,* 650 F. 2d 1379 (6th Cir. 1981), *cert. granted,* 50 U.S.L.W. 3436 (Nov. 30, 1981) (hereinafter, "*Jackson*"); *Division 1235, Amalgamated Transit Union* v. *Metropolitan Transit Authority, ATE Management & Service Co. Transportation Management of Tennessee, Inc.,* 650 F. 2d 1389 (6th Cir. 1981) (hereinafter, "*Nashville I*"). Since this decision, the Court of Appeals for the Ninth Circuit has also ruled in accord with the decision here. *Division 587, Amalgamated Transit Union* v. *Municipality of Metropolitan Seattle,* No. 80-3532 (9th Cir. Nov. 24, 1981). (A copy of the recent Ninth Circuit decision is provided in Respondent's Appendix (hereinafter "Resp. App."), p. A1. A copy of the First Circuit's initial opinion is included in Pet. App. pp. 64-125; a copy of the opinion on rehearing en banc, which Petitioner omitted, is included in Resp. App., p. B1).

(Footnote continued on next page)

ARGUMENT

I.

THIS CASE ADDS NOTHING TO THE CONSIDERATION OF THE JACKSON CASE.

Petitioner presents a number of contentions in support of its Petition for certiorari here. The threshold issues here — whether the federal district court possessed subject matter jurisdiction and whether Plaintiff states a claim — are the subject of *Jackson, supra.* On November 30, 1981, this Court granted a writ of certiorari in *Jackson,* and nothing in this case will advance this Court's consideration of these issues there.

(Footnote continued from preceding page)

The federal District Courts and state courts have ruled similarly. *Local Division 1039, Amalgamated Transit Union* v. *Capital Area Transit Authority,* No. G-81-200 (W.D. Mich., Sept. 23, 1981) (hereinafter, *"Lansing"*); *Local Division 732, Amalgamated Transit Union* v. *Metropolitan Atlanta Rapid Transit Authority,* 598 F. Supp. 498 (N.D. Ga. 1981) (appeal pending); *Local Division 519, Amalgamated Transit Union* v. *Massachusetts Bay Transportation Authority,* 511 F. Supp. 312 (D.Mass. 1981) *rev'd on other grounds,* —— F. 2d ——, Nos. 81-1180, 81-1198, 81-1219 (1st Cir. Sept. 30, 1981), modified on rehearing, *en banc* Oct. 23, 1981 (hereinafter, *"Boston"*). *Local Division 174 and 1037, Amalgamated Transit Union* v. *Southeastern Regional Transportation Authority,* No. 80-2427-5 (D. Mass., Feb. 25, 1981); *Division 1571* v. *Golden Gate Bridge Highway and Transportation District,* No. C-79-2278 (N.D. Cal. May 27, 1980); *Division 1235* v. *Metropolitan Transit Authority, ATE Management & Service Co., Transportation Management of Tennessee, Inc.,* No. 80-3452 (M.D. Tenn. Oct. 16, 1980) (appeal pending, No. 80-5397) (hereinafter, *"Nashville II"*); *Division 276* v. *Stockton Metropolitan Transit District,* No. 146157 (Cal. Super. Court, April 18, 1980) (hereinafter, *"Stockton"*); *Division 1287* v. *Kansas City Area Transportation Authority,* No. 77-0663-W-2 (W.D. Mo. Feb. 21, 1980) (hereinafter, *"Kansas City II"*); *Local 192* v. *Alameda-Contra Costa Transit District,* No. 513665-4 (Cal. Super. Ct. Nov. 6, 1980); *Division 1177* v. *Tidewater Transportation District Commission, et al.,* No. 79-968-N (E.D. Va. 1979); *Division 1212* v. *Chattanooga Area Regional Transportation Authority,* No. CIV-1-79-212 (E.D. Tenn. Oct. 12, 1979); *Division 1309* v. *San Diego Transit Corporation,* No. 78-1093-E (S.D. Ca. Jan. 9, 1979).

As set forth more fully below, none of the other issues presented warrants *certiorari* here.

II.

THE REMAINING ISSUES PRESENTED DO NOT WARRANT CERTIORARI.

A.

The Tenth Amendment Claim Does Not Warrant Certiorari.

Petitioner tenders the issue of whether § 13(c) of the Urban Mass Transportation Act violates the Tenth Amendment of the United States Constitution (Pet., pp. 17 & 18). This contention is unsound in principle, as this Court has recognized. *North Carolina ex rel. Morrow* v. *Califano,* 445 F. Supp. 532 (E.D. N.C. 1977) (three-judge court), *aff'd. mem.,* 435 U.S. 962 (1978).

In *North Carolina,* the District Court ruled, and this Court affirmed, that federal conditions on the receipt of health care funds do not violate the Tenth Amendment, holding:

> Plaintiff cites *National League of Cities* v. *Usery* (1976) 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245. That case is not in point. It involved whether the Commerce Clause authorized a wage-hour amendment covering the employees of states or their subdivisions. We do not have such a direct regulation here; neither is the constitutional basis for the condition the Commerce Clause. The constitutional authorization in this case is the "spending power." 445 F. Supp., at 536, n. 10.

One of the first courts to consider this contention regarding § 13(c) recognized at once that § 13(c) represents an exercise of the same spending power at issue in *North Carolina, supra,* and, accordingly, *National League of Cities* v.

Usery does not apply. *LaCrosse, supra,* 445 F. Supp., at 818-19; *aff'd.,* 585 F. 2d 1340. Although the issue has been raised occasionally since *LaCrosse,* no other Court has seen fit to reconsider that ruling.

B.

This Case Does Not Present The Boston Issues.

Finally, citing the decision of the United States Court of Appeals for the First Circuit in *Boston, supra* (Pet., p. 7, 8), Petitioner proffers the question of whether, assuming § 13(c) to be enforceable federal law, federal or state law controls in case of conflict. As set forth below, Kentucky has never passed a law nullifying TARC's federal commitments; indeed, Kentucky law has, at all times, fully authorized TARC to comply with the federal demands here. Accordingly, the issue of federal/state law conflict is not presented here.

Here, as in *Kansas City I, supra,* and unlike *Boston,* the transit authority was explicitly authorized by the state to "accept gifts, grants, or loans of money or other property from the United States" and to "enter into any agreement required in connection therewith" and to "comply with any federal or state laws or regulations applicable thereto" KRS 96A.090. (Pet. App., p. 60).[4] On November 25, 1981, the United States Court of Appeals for the Ninth Circuit ruled unanimously in *Seattle, supra,* that Washington law, undistinguishable from the Kentucky law set forth above, authorized the transit authority to comply with its federal arbitration commitments under § 13(c).[5] Accordingly, contrary to Petitioner's representation to this Court, Petitioner was fully authorized under Kentucky law at all times, to make whatever commitments the federal law required.

---

[4] Pursuant to its statutory authority to enter into agreements necessary to receive federal funds, and on advice of its counsel, Petitioner's Board of Trustees passed a resolution authorizing the very § 13(c) Agreement at issue here. Petitioner, on the advice of its counsel, represented to the United States Department of Transportation that no state law impeded Petitioner's compliance with its federal commitments. This opinion of Counsel is required by the External Operating Manual, App. III, UMTA 1002, Chg. III, 5/10/74, p. 69 and UMTA Circular 9050.1, 10/10/77, p. I-5.

In face of TARC's explicit authority to do whatever is necessary to qualify for federal funds, Petitioner presents this Court with arguments drawn from general doctrines of Kentucky state common law. (Pet., p. 10). Petitioner admits that § 250 of the Kentucky Constitution permits the legislature to enact laws authorizing arbitration, but then denies the existence of any such laws. (Pet., pp. 8-11). To the contrary, however, KRS 96A.090 explicitly provides unrestricted authority for Petitioner to enter into *any* agreement required in connection with any grant of transit money from the United States. Here, the Agreement required by federal law, and thus within TARC's authority to conclude, included the choice of arbitration for disputes like this one. Thus, § 250 supports, rather than detracts from, Respondent's position.

Petitioner next cites to *Fite & Warmath Construction Co.* v. *MYS Corp.,* 559 S.W. 2d 729 (Ky. 1977), where the

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[5] In *Seattle,* the Washington statute empowered the transit authority with:

> . . . all powers necessary to comply with any criteria, standards, and regulations which may be adopted under the [UMTA] . . . and to take all actions necessary to meet the requirements of that act." (Wash. Laws, 1st Ex. Sess. 1975 Ch. 270 § 8, cited in *Seattle, supra*) (Resp. App., p. A1).

Kentucky Supreme Court ruled that the federal arbitration act applies, even in state court, to authorize private companies to arbitrate disputes in interstate commerce. Petitioner cites *Fite* for the proposition that, absent statutory authority, Kentucky common law would preclude arbitration of future disputes. Actually, the *Fite* court opined at length to the contrary, noting:

> Our case law has stated that it is the policy to favor the settlement of disputes by means of arbitration. (*Id.*, at 735).

and concluding that the enforcement of the federal arbitration act "does not displace a fundamental public policy of this state." *Id.* As *Fite* reflects, the Kentucky Courts do not hold that future disputes are not arbitrable under Kentucky law, and Petitioner cites no case that so holds.[6]

Petitioner makes a number of other contentions that would essentially preclude it from bargaining collectively or otherwise complying with almost every § 13(c) requirement. Thus, Petitioner contends that arbitration would violate its duty to set its employees' wages, KRS 96A.070 (6) and that arbitration would cause it to violate its budget processes, KRS 96A.360. (Pet. pp. 10-11). These contentions are completely incredible in light of Petitioner's unbroken history of collective bargaining with this Respondent since the public takeover in 1974. Arbitration no more violates these provisions than collective bargaining does. Not surprisingly, Petitioner cites no authority for the preclusion of this whole range of labor relations under Kentucky law.[7]

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[6] Indeed, *Fite* also supports Respondent's alternative contention: that, even without the explicit authority of KRS 96A.090, Petitioner, empowered by KRS 96A.020 with all powers normally enjoyed by a private corporation, would not be precluded from arbitrating under Kentucky common law.

In sum, the District Court and the Court of Appeals ruled correctly that Petitioner's obligations under its § 13(c) Agreements are enforceable as a matter of federal law. (Pet. App., pp. 23, 31, 32). Plaintiff did not seek, as it did in *Boston,* to strike down Kentucky law, because Kentucky law, unlike Massachusetts' does not preclude Petitioner from complying fully with its federal commitments. Indeed, as set forth above, Kentucky law explicitly authorizes compliance. Thus, this case does not present the issues presented in *Boston,* and any review of that decision should await proper presentation of that case.

---

[7] Nothing in the obligation to bargain collectively or arbitrate labor disputes causes a violation of Petitioner's budget process under KRS 96A.360 (Pet., p. 10). The Petitioner's obligation under its collective bargaining agreement is no different from its obligation under any other authorized contract, as far as the budget process is concerned. There is nothing in the record to indicate that TARC failed to submit its annual budget or that the budget was not duly approved, as KRS 96A.360 requires.

Nor does bargaining and arbitration violate TARC's authority to set its imployees' wages under KRS 96A.070(6), and Petitioner cites no authority for this contention. The general statutory authority exists side by side with the explicit authority under KRS 96A.090, to comply with any agreements necessary for obtaining federal funds, and the obligation under KRS 96A.200 to take over the labor contract of any acquired transit system. In this case, the Petitioner has exercised its authority to set its employees' wages and its authority to make any commitments necessary to accept federal funds by making its § 13(c) commitment to set employees wages through bargaining or, where necessary, arbitration.

Petitioner also contends that this Court should grant certiorari, because the District Court refused to rule that the language of the § 13(c) Agreement, disclaiming intent to waive rights to economic action not otherwise prohibited by law, means that Respondent contracted to have its entire 13(c) arbitration rights subordinated to allegedly contrary state law. (Pet., p. 17) (See, Pet. App., p. 45 for full text of the provision at issue).[8] Since, as set forth above, the state law is not contrary, this contention does not warrant further review. In any case, there is no conflict in the Circuits as to this language; no other Courts have construed that language as Petitioner proposes, nor, of course, has this Court done so, and Petitioner's contentions do not rise to a certiorari issue.

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8. Since the provision Petitioner cites says nothing about state law and since Petitioner offers no textual analysis in support of its contentions, further response should be unnecessary.

The phrase "economic measures", as utilized in the § 13(c) Agreement at this point (Pet. App., p. 45), is a common labor term, meaning the strike/lockout weapons of economic warfare, which are an alternative to interest arbitration. Elkouri and Elkouri, *How Arbitration Works, supra,* at 50. Thus, the language Petitioner cites is basic labor terminology that, by agreeing to arbitration, the parties do not waive their preexisting rights, if any, to strike or lockout.

CONCLUSION

The threshold jurisdictional issue here is already before this Court in another case. The conflict issue is not presented here, and Petitioner's other contention does not warrant certiorari.

Respectfully submitted,

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Appendix

I

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DIVISION 587, AMALGAMATED TRANSIT UNION, AFL-CIO,
Plaintiff-Respondent,
v.
MUNICIPALITY OF METROPOLITAN SEATTLE,
Defendant-Petitioner.

No. 80-3532
D.C. # CV 80-1227
Opinion

Appeal from the United States District Court for the Western District of Washington
Walter T. McGovern, District Judge, Presiding
Argued and submitted August 4, 1981

Before: WRIGHT, SCHROEDER and ALARCON, Circuit Judges.

SCHROEDER, Circuit Judge:

The Municipality of Metropolitan Seattle ("Metro") appeals from a preliminary injunction ordering it to submit to interest arbitration of a new collective bargaining agreement pursuant to the terms of a contract required by § 13(c) of the Urban Mass Transportation Act of 1964, 49 U.S.C. §§ 1601 *et seq.* Four other circuits have considered union applications to enforce parallel provisions of similar contracts; in all instances the union's position was sustained. *Local Division 1285, Amalgamated Transit Union, AFL-CIO* v. *Jackson Transit Auth.*, 650 F. 2d 1379 (6th Cir. 1981); *Division 1235, Amalgamated Transit Union, AFL-CIO* v. *Metropolitan Transit Auth.*, 650 F. 2d

1389 (6th Cir. 1981); *Local Division 714, Amalgamated Transit Union, AFL-CIO* v. *Greater Portland Transit Dist.*, 589 F. 2d 1 (1st Cir. 1978); *Local Division 519, Amalgamated Transit Union, AFL-CIO* v. *LaCrosse Municipal Transit Util.*, 585 F. 2d 1340 (7th Cir. 1978); *Division 1287, Amalgamated Transit Union, AFL-CIO* v. *Kansas City Area Transp. Auth.*, 582 F. 2d 444 (8th Cir. 1978). We do not depart from that pattern. Nor do we find that the district court abused its discretion in entering the injunction. We affirm

Section 13(c) of the Act, 49 U.S.C. § 1609(c),[1] requires recipients of federal transit funds to make fair and equitable arrangements to protect the interests of their employees affected by such assistance. These arrangements take the form of agreements between the grant recipient and the union; the agreements must be approved by the United States Secretary of Labor as a condition of the receipt of federal funds. Metro and the appellee union have entered into a series of such § 13(c) agreements since 1972.

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[1] Section 13(c) reads in full:

> (c) It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.

Paragraph 15(a) of the 1980 § 13(c) agreement requires that the terms of a new collective bargaining agreement be submitted to binding arbitration ("interest arbitration") if a dispute has been unresolved for over thirty days.[2] The principal issues before us pertain not to the interpretation of that provision but to its enforceability.

The threshold issue in this case, as in the other federal cases involving § 13(c) agreements, is that of federal subject matter jurisdiction. The union argues that this is a case which "arises under" federal law within the meaning of 28 U.S.C. § 1331. Commentators on the issue of the proper scope of federal question jurisdiction seem agreed on only one proposition: no completely satisfactory analytical framework has yet been devised. See the discussion in 13 Wright, Miller & Cooper, Federal Practice and Procedure § 3562 (1975). In this circuit, at least, the favored formulation appears still to be that the case must arise "directly" under federal law, a standard drawn from Justice Cardozo's famous "compass," in *Gully* v. *First Nat'l Bank,* 299 U.S. 109, 57 S. Ct. 96 (1936). *See, e.g., Town of Greenhorn* v. *Baker County,* 596 F. 2d 349, 351 & n. 8, 353 (9th Cir. 1979); *Keaukaha-Panaewa Community Ass'n* v. *Hawaiian Homes Comm'n,* 588 F. 2d 1216, 1225-26 (9th Cir. 1978); *League to Save Lake Tahoe* v. *B. J. K. Corp.,* 547 F. 2d 1072, 1074 (9th Cir. 1976). However, the likelihood of the invocation of this test has proved more certain than the result of its application. *See, e.g.,* Cohen, *The Broken Compass: The Requirement That a Case Arise "Directly" Under Federal Law,* 115 U. Pa. L. Rev. 890 (1967).

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[2] Paragraph 15(a) provides in relevant part:

> In the case of any labor dispute involving the application, interpretation or enforcement of any of the provisions of this agreement . . . which cannot be settled by the parties within thirty (30) days, the same may be submitted at the written request of either party to a board of arbitration . . . The term "labor dispute" shall be broadly construed and shall include any controversy concerning . . . the making or maintaining of collective bargaining agreements, [and] the terms to be included in such agreements . . . .

Metro's position is that this is simply a contract dispute which should be settled in state court. It stresses that a suit on an agreement between private parties does not raise a federal question merely because the agreement was authorized by federal law or because some federal agency approved the agreement. *See McFaddin Express, Inc.* v. *Adley Corp.,* 346 F. 2d 424 (2d Cir. 1965); *Chicago & Northwestern Ry.* v. *Toledo, Peoria & W. R.R.,* 324 F. 2d 936 (7th Cir. 1963). It also points out that the statute itself does not require that the agreements contain privisions for interest arbitration and it therefore urges that the matter cannot be said to "arise under" the laws of the United States within the meaning of § 1331.

Careful review of the authorities persuades us that much more is involved here than simple congressional authorization to contract coupled with governmental approval of contractual provisions. Congress in § 13(c) did not merely authorize agreements to preserve collective bargaining rights of employees. It required them. Congress further required that the Secretary of Labor determine what terms must be included, and Congress specified that the agreements would become part of the grant contract between the United States and the transit authority. In addition, it authorized the Secretary to enforce those contracts. 49 U.S.C. §§ 1602(f), (g); 1608(a); 12 U.S.C. § 1749a. The most extensive discussion of these matters is contained in *Greater Portland, supra,* 589 F. 2d at 5-8, in which the court concluded that violation of a § 13(c) agreement would amount to a violation of federal law. We agree with the First Circuit's statement that, by requiring labor agreements under § 13(c), "Congress implicitly mandated both compliance with those arrangements and a federal remedy for their breach." *Id.* at 7.

With respect to enforcement by private suit, it seems apparent that Congress, in requiring a contractual agreement as the vehicle for the protection of existing labor standards, intended these rights to be enforceable through private actions. Metro does not contend otherwise, nor does it suggest that the four-part test set forth in *Cort* v. *Ash,* 422 U.S. 66, 78, 95 S. Ct. 2080, 2088 (1975), is not met. Moreover, the legislative history of the statute confirms that it was intended to prevent employees from losing any rights that they may have enjoyed previously. including rights conferred by the National Labor Relations Act and enforceable in the federal courts. *Jackson Transit, supra,* 650 F. 2d at 1385. *See generally International Association of Machinists* v. *Central Airlines,* 372 U.S. 682, 83 S. Ct. 956 (1963). Again, we see no compelling reason to depart from the unanimous line of authority from other circuits that have considered this question.[3]

Apart from jurisdiction, the main argument presented by Metro is that the parties have agreed to be governed by state law and that state law does not permit Metro to agree to engage in interest arbitration.

Metro's contention that the parties have agreed to be governed by state law is based upon the wording of the severence provision of the § 13(c) agreement. The provision is designed to provide for continuity should any part of the agreement be declared invalid, and it states:

> In the event any provision of this agreement is held to be invalid, or otherwise unenforceable under the federal, State, or local law, in the context of a particular Project, the remaining provisions of this agreement shall not be affected and the invalid or unenforceable provision shall be renegotiated by Metro and the interested union representatives of the employees involved for purpose of adequate replacement under § 13(c) of the Act. If such negotiation shall not result in mutually satisfactory agreement, any party may invoke the jurisdiction of the Secretary of Labor to determine substitute fair and equitable employee protective arrangements for application only to the particular Project, which shall be incorporated in this agreement only as applied to that Project, and any other appropriate action, remedy, or relief.

This contingency provision is not a statement that the parties have agreed to be governed by state law in the event of a conflict between the provisions of the agreement and state law.

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[3] This issue is not entirely free from doubt and has caused one judge to dissent. *See Local Division 1285, Amalgamated Transit Union 1285, AFL-CIO* v. *Jackson Transit Authority,* 650 F. 2d 1379, 1388-89 (6th Cir. 1981) (Merritt, J., dissenting).

Nor do we agree with Metro that the arbitration provision of the § 13(c) agreement conflict with Washington state law concerning powers of municipal corporations in the area of collective bargaining. Metro's argument is premised upon R.C.W. § 35.58.350, a general statute vesting the powers of a municipal corporation with respect to salaries, wages, and other compensation in the metropolitan council.[4] Metro concedes that these powers of municipal corporations are for the legislature to determine, *see Spokane* v. *Spokane Police Guild,* 87 Wash. 2d 457, 553 P. 2d 1316, 1320 (S. Ct. 1976), and that the legislature has greatly expanded the scope of collective bargaining and arbitration for public employees. It argues, however, that because there is no specific statute expressly permitting it to engage in interest arbitration as provided for in this § 13(c) agreement, Washington law prohibits enforcement of those provisions. While it is true that the legislature has not dealt specifically with every aspect of the

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[4] Section 35.58.350 states that

> [a]ll the powers and functions of a metropolitan municipal corporation shall be vested in the metropolitan council unless expressly vested in specific officers, boards, or commissions by this chapter. Without limitation of the foregoing authority, or of other powers given it by this chapter, the metropolitan council shall have the following powers:
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> . . .
>
> (3) To fix the salaries, wages and other compensation of all officers and employees of the metropolitan municipal corporation unless the same shall be otherwise fixed in this chapter.

Urban Mass Transportation Act, it has acted to harmonize Washington law generally with any requirement that Metro might have to meet to obtain funding under the Act. More specifically, the Washington legislature has provided that "[a]ny . . . metropolitan municipal corporation . . . shall have all powers necessary to comply with any criteria, standards, and regulations which may be adopted under the [UMTA] . . . and to take all actions necessary to meet the requirements of that act."[5]

Thus we need not reach the question recently decided by the First Circuit regarding the enforceability of interest arbitration provisions in the face of newly enacted state law expressly limiting arbitration of wages in the transportation industry. *Local Division 589, Amalgamated Transit Union, AFL-CIO* v. *Massachusetts,* Slip op. Nos. 81-1180, 81-1198, 81-1219, September 30, 1981, *rehearing en banc denied,* October 23, 1981. In that case the Massachusetts legislature had earlier passed general enabling legislation quite similar to Washington's. Later, however, it enacted statutes specifying the scope of and procedures for arbitration involving the MBTA which conflicted with existing arbitration provisions of the § 13(c) agreement between the MBTA and the union. Acknowledging that other circuits have stated that the § 13(c) obligations are binding regardless of state law, *id.* at 39-40 & n. 47, the First Circuit nevertheless concluded on the basis of an exhaustive review of the legislative history of the UMTA that "the specific detailed assurances given by a union and a transit authority to the Labor Department under (UMTA) § 13(c) do not invalidate a state law to the contrary." *Id.* at 40.

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[5] Added by Laws, 1st Ex. Sess. 1975 ch. 270 § 8, effective July 1, 1975. See also R.C.W. § 35.58.180, empowering metropolitan municipal corporations to enter into contracts with the United States on such terms as may be agreed upon by the contracting parties.

That is not our case. While we agree that the preemption question is a difficult one, we need not and do not address it in light of Metro's failure to establish that the threshold element, a conflict between state law and the § 13(c) agreement, is presented. The statutes we have referred to, R.C.W. 35.58.2794 and 35.58.180, confer on Metro a broad authority to take those steps necessary to qualify for federal financial assistance; having done so, Metro cannot now argue that it was barred from taking those necessary steps by a prior and more general statute.

Metro also contends that the entire § 13(c) agreement, including the provisions regarding collective bargaining and interest arbitration, applies only to those employees shown by the union to have been directly and adversely affected by the expenditure of federal funds. The overall purpose of § 13(c) of the Act was to protect the rights of transit employees, and the § 13(c) agreement between these parties contains a number of provisions relating to individual grievances arising out of a federally funded project. There is no suggestion in this record, however, that there have been different collective bargaining agreements for employees directly affected by a federally funded project as opposed to those who are not. The language in the § 13(c) agreement upon which Metro relies is found in paragraph 15(b), requiring that in "any dispute as to whether or not a particular employee was affected by the Project," the employee must identify both the "Project" and the facts relied upon. We fail to see the relevance of that provision to collective bargaining negotiations. Indeed, paragraph 15(b) would seem to be inapplicable by its terms, as there has never been any dispute in this action "as to whether or not a particular employee was affected by the Project." The only plausible construction of paragraph 15(b) is that it relates to grievances of individual employees; it cannot be construed as a limitation on the collective bargaining provisions contained in paragraph 15(a).

We cannot quarrel with the district court's analysis of the balance of hardships involved in the issuance of an injunction requiring arbitration in order to avoid delay. *See LaCrosse, supra,* 585 F. 2d at 1350-51.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST DISTRICT

No. 81-1180

LOCAL DIVISION 589, AMALGAMATED TRANSIT UNION, AFL-CIO, CLC,

Plaintiff, Appellant,

v.

THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,

Defendants, Appellees.

No. 81-1198

LOCAL DIVISION 589, AMALGAMATED TRANSIT UNION, AFL-CIO, ET AL.,

Plaintiffs, Appellees,

v.

THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,

Defendants, Appellants.

No. 81-1219

LOCAL DIVISION 589, AMALGAMATED TRANSIT UNION, AFL-CIO,

Plaintiff, Appellee,

v.

THE COMMONWEALTH OF MASSACHUSETTS,

Defendant, Appellee.

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Walter Jay Skinner, *U.S. District Judge*]
[511 F. Supp. 312 (D. Mass. 1981)]

Before
Coffin, *Chief Judge*

Campbell, Bownes and Breyer,
Circuit Judges.

MEMORANDUM AND ORDER

Entered October 23, 1981

PER CURIAM. The plaintiff in these cases, the Transit Union, moves this court to reconsider its decision of September 30, 1981, to rehear this case *en banc,* and to grant an additional thirty days to file a further brief in support of its motions. The parties have had considerable opportunity to argue their position in this case. Initially, when this court considered an application for a stay of the district court's order, the Transit Union filed a brief, a reply brief, and argued orally at hearing. Subsequently, with the court's permission, the Transit Union filed a 100-page brief and a reply brief on the merits; it again participated in oral argument. It has now filed an 11-page brief in support of its present motions. All of these briefs have involved, roughly speaking, the same issues which were considered thoroughly by this court in its September

30, 1981 opinion. We are therefore reluctant, given the demands of other cases, to grant extensions of time, and to invite further briefing.

Moreover, we do not believe that additional briefing is necessary given the arguments that the Transit Union now seeks to raise:

1. The Transit Union states that we did not address the question of whether the Massachusetts state laws violate the Contract Clause of the Constitution through conflict with the 1974 § 13(c) assurances that the Transit Union and the MBTA made to the Secretary of Labor; rather, our Contract Clause discussion focused upon the 1973 Basic Agreement between the Transit Union and the MBTA. It is true that the parties did not argue the "§ 13(c)/Contract Clause" issue as a separate matter before us. But, had they done so, the result would have been the same. We held that Congress intended that § 13(c) assurances be subject to specific state statutes to the contrary. Consequently, any § 13(c) agreement was made subject to possible state enactment of a conflicting statute. Hence, such a statute could not have impaired the obligations of the "contract" (if it was one).

2. The Transit Union argues that we ought not to have applied the standard of *Schwartz* v. *Texas*, 344 U.S. 199 (1952), requiring a clear showing of Congressional intent to preempt a field. Since we are dealing with the question of whether Congress intended a set of lengthy, detailed, specific assurances, presented to the Secretary of Labor by private parties to prevail over state law to the contrary, the *Schwartz* standard would seem appropriate. But even if it is not, the result would not change. Our review of the relevant legislative history, set out in the

opinion, makes clear that Congress did not intend the detailed, local assurances negotiated under § 13(c) to invalidate specific state laws to the contrary.

3. The Transit Union reiterates its view that our decision conflicts with the law in other circuits. We discussed the views of other circuits, including that of the Sixth Circuit and Eighth Circuit, in our opinion. We concluded that contrary views, for the most part, are expressed in dicta or alternative holdings. We found no other opinion that explored the issue in depth. None of the cases cited involves the type of conflict between state law and § 13(c) assurances present here, namely, state law that takes the form of a specific, clear state statute, directly and purposefully aimed at local transit problems (and an ambiguously worded § 13(c) agreement made several years before). We remain convinced that there is not yet any significant conflict on this issue among the circuits. But, in any event, for reasons previously set out, we have not followed the approach that the Transit Union believes the opinions that it cites suggest.

4. The Transit Union points to legislative history showing that § 13(c) was amended by Senator Morse and states that the amendment makes the difference. This court previously reviewed the entire legislative history of the statute, including the Morse amendment. That amendment was directed at the *terms* of the § 13(c) assurance, not at the question of whether the assurance was designed to supersede state law. Indeed, as the opinion points out, Senator Morse himself subsequently stated that the "state can continue its [conflicting] policy if it wishes to; but . . . the State should not be allowed to receive Federal money . . . ."

5. The Transit Union states that a rehearing *en banc* is required because we have modified a prior decision, *Local Division 714, Amalgamated Transit Union* v. *Greater Portland Transit District*, 589 F. 2d 1 (1st Cir. 1978). The "question of when to hold, or when not to hold, an *en banc* hearing is within the discretion of this court." *United States* v. *Martorano*, 620 F. 2d 912 (1st Cir. 1980); Fed. R. App. P. 35(a). As we pointed out, we have not overruled *Greater Portland*. *Greater Portland* holds that the federal courts have jurisdiction to enforce § 13(c) agreements. We stated that we would not follow language in that opinion insofar as it might be read to suggest that a § 13(c) assurance automatically prevails over conflicting state law. *Greater Portland* will still offer both jurisdiction and meaningful relief in other cases.

6. The Transit Union makes other arguments related to the enforceability of § 13(c) and potential conflict between state law and that statute. We have discussed these issues in the opinion, describing the discretion that Congress meant to confer upon the Secretary of Labor and concluding that the Secretary maintains authority to prevent violation of the statute.

This cursory review of the issues the Transit Union now raises is meant to suggest that, for the most part, its arguments are dealt with more thoroughly in our previous opinion and that its other arguments do not provide adequate reason for a rehearing or a rehearing *en banc*. Consequently, the motions for a rehearing, rehearing *en banc*, and for an extension of time to file a further brief are denied.

By the Court:

/s/ DANA H. GALLUP,
Clerk.